124-394

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 960.

THE IRON SILVER MINING COMPANY, PLAINTIFF IN ERROR,

vs

JOSEPH REYNOLDS AND J. D. MORRISSEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED JUNE 16, 1887.

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 7th day of May, A. D. 1884, came the Iron Silver Mining Company, by G. G. Symes, Esq., its attorney, and filed in said court its complaint and sued out of said court a writ of summons against Joseph Reynolds and J. D. Morrissey.

And the said complaint is in words and figures as follows, to wit:

Complaint.

In the Circuit Court of the United States for the District of Colorado, in the Eighth Circuit.

THE IRON SILVER MINING COMPANY, Plaintiff,
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY, Defendants.

The Iron Silver Mining Company, a corporation created and organized under the laws of the State of New York and a citizen of
2 the said State of New York, complains of Joseph Reynolds, who is a citizen of the State of Illinois, and J. D. Morrissey, who is a citizen of the State of Colorado, and for cause of action alleges—

1st. That on the 1st day of January, A. D. 1884, the said plaintiff company was, and long before had been and now is, the owner and seized and possessed of that certain tract of land and mining claim situated in California mining district, county of Lake and State of Colorado, consisting of one hundred and ninety-three and forty-three one-hundredths (193.43) acres of land, more or less, and particularly described by metes and bounds in the United States patent issued therefor as follows, with magnetic variation fifteen (15) degrees east, to wit:

3 Beginning at cor. No. 1, a porphyry rock 5 x 6 x 9 in. in size, marked 1–281, from which U. S. locating monument No. 1 bears N. 73° 1′ 36″ W. at 10,870 and 63,100 ft. and the peak of Bald Mt. bears S. 65° 35′ E., thence from cor. No. 1 S. 79° 28′ E. 590.5 ft. to cor. No. 2, a porphyry rock 5 x 7 x 12 in. in size, marked 2–281; thence S. 58° 8′ E. 436 ft. to road, 721 ft. to cor. No. 3, a granite rock 5 x 7 x 13 in. in size, marked 3–281; thence S. 25° 4′ W. 68 ft. to cor. No. 4, a granite rock 7 x 8 x 8 in. in size, marked 4–281; thence S. 66° 8′ E. 733 ft. to cor. No. 5, a granite rock 7 x 11 x 13 in. in size, marked 5–281; thence S. 29° 48′ W. 20 ft. to N. bank of California gulch, 66 ft. to stream, 90 ft. to S. bank of California gulch, 133 ft. to cor. No. 6, a quartz rock 8 x 11 x 12 in. in size, marked 6–281; thence N. 72° 50′ W. 250 ft. to cor. No. 7, a quartz rock 6 x 8 x 12 in. in size, marked 7–281; thence S. 20° 48′ W. 240 ft. to N. bank of Eureka gulch, 550 ft. to S. bank of said gulch, 845 ft. to cor. No. 8, a porphyry rock 7 x 9 x 12 in. in size, marked 8–281; thence S. 72° 8′ W. 200 ft. to cor. No. 9, a porphyry rock 5 x 7 x 10 in. in size, marked 9–281; thence S. 400 ft. to cor. No. 10, a quartz

rock 5 x 6 x 10 in. in size, marked 10–281, from which a blazed pine tree 13 in. in diameter bears N. 32° 10′ E. 8.3 ft. and a pine 14 in. in diameter, blazed & marked 10–281, bears S. 71° 38′ E. — ft.; thence from cor. No. 10 S. 39° 56′ W. 750 ft. to cor. No. 11, a quartz rock 4 x 8 x 11 in. in size, marked 11–281, from whence a pine tree 16 in. in diameter, blazed and marked 11–281, bears N. 62° 12′ E. 12 ft. & a pine tree 9 in. in diameter, blazed and marked 11–281, bears S. 15° 21′ E. 8.10 ft.; thence from said cor No. 11 W. 128.71 ft. to cor. No. 12, a granite rock 5 x 7 x 11 in. in size, marked 12–281, from which a pine tree 13 in. in diameter, blazed & 4 marked 12–281, bears S. 5° 13′ E. 16.2 ft. and a pine tree 11 in. in diameter, blazed and marked 12–281, bears S. 59° 8′ W. 14.8 ft.; thence from cor. No. 12 S. 11,004.1 ft. to cor. No. 13, a granite rock 5 x 11 x 14 in. in size, from which Mt. Sheridan bears S. 73° 36′ E.; monument on Mt. Elbert bears S. 54° 46′ W.; a pine tree 9 in. in diameter, blazed & marked 13–281, bears S. 24° 8′ W. 10.5 ft., and a pine tree 5 in. in diameter, blazed & marked —, bears N. 77° 47′ W. 13 ft.; thence from cor. No. 13 W. 3,590.16 ft. to cor. No. 14, a granite rock 5 x 10 x 14 in. in size, marked 14–281, from which a pine tree 11 in. in diameter, blazed & marked 14–281, bears N. 29° 32′ E. 11.2 ft. & a blazed pine tree 12 in. in diameter, marked 12–281, bears N. 71° 25′ W. 31 ft.; thence from cor. 14 26′ W. 1,138.69 — to cor. No. 15, a quartz rock 5 x 7 x 9 in. in size, marked 15–281, from which a blazed pine tree 17 in. in diameter bears N. 65° 15′ W. at 11.01 ft.; a double pine tree, blazed & marked 15–281, bears S. 19° 10′ E. 10 ft.; thence from cor. No. 15 E. 590 ft. to cor. No. 16, a porphyry rock 7 x 8 x 11 in. in size, marked 16–281, the same being cor. No. 3 of sur. No. 336; thence N. 65° 15′ E. along the southerly boundary of said sur. 236 527 ft. to cor. No. 17, a porphyry rock 5 x 12 x 12 in. in size, marked 17–281, the same being cor. No. 1 of sur. No. 259; thence S. 50° E. 472.47 ft. to cor. No. 18, a granite rock 3 x 8 x 14 in. in size, marked 18–281, the same being cor. No. 2 of said sur. No. 259; thence N. 65° E. 531.29 ft. to cor. No. 19, a granite rock 5 x 5 x 15 in. in size, marked 19–281; thence S. 190 ft. along the western boundary of the Oro La Plata lode to cor. No. 20, a granite rock 6 x 6 x 18 in. in size, marked 20–281, from which a blazed pine tree 7 in. in diameter bears N. 19° 30′ E. 5.5 ft. & a blazed pine tree 12 in. in diameter bears S. 80° 30′ W. 19 ft.; thence from cor. No. 5 20 E. along the S. boundary of said Oro La Plata lode 30 ft. to cor. No. 21, a granite rock 6 x 7 x — in. in size, marked 21–281, from which a blazed pine tree 14 in. in diameter bears N. 72° 6′ E. 21.1 ft. and a blazed pine tree 6 in. in diameter bears N. 35° 33′ E. 12.8 ft.; thence from cor. No. 21 N. along the E. boundary of said Oro La Plata lode 399.89 ft. to cor. 22, a quartz rock 6 x 6 x 9 in. in size, marked 22–281; thence N. 65° E. 152.7 ft. to cor. 23, a lime rock, marked 23–281, the same being cor. No. 3 of sur. No. 259, from which a blazed pine tree 14 in. in diameter bears S. 72° 4′ E. 11.8 ft. & a blazed pine tree 10 in. in diameter bears N. 16° 30′ E. 26 ft.; thence from cor. No. 23 S. 50° E. 8.66 ft. to cor. No. 24, a granite rock, marked 24–281, the same being cor. No. 4 of sur. No. 259, from which a blazed pine tree 13 in. in diameter bears N. 1° 12′ E. 30.7 ft.;

thence from cor. No. 24 N. 65° 15′ E. 300 ft. to cor. No. 25, a granite rock, marked 25–281, the same being No. 25 of sur. No. 259, from which a blazed pine tree 18 in. in diameter bears N. 89° 20′ W. 12.5 ft. and a blazed pine tree 15 in. in diameter bears S. 4 ft.; thence from cor. No. 25 50° W. 310 ft. to cor. No. 26, a granite rock 5 x 9 x 12 in. in size, marked 26–281, the same being cor. No. 26 of sur. No. 259, from which a blazed pine tree 16 in. in diameter bears S. 10° 31′ W. 33 ft. & a blazed pine tree 18 in. in diameter bears S. 45° 42′ W. 15.2 ft.; thence from cor. No. 26 S. 65° W. 198.52 ft. to cor. No. 27, a granite rock 7 x 9 x 11 in. in size, marked 27–281, from which a blazed pine tree 14 in. in diameter bears N. 19° 50′ E. 6 ft.; a blazed pine tree 12 in. in diameter bears N. 72° 24′ W. at 27.5 ft.; thence from cor. No. 27 N. 409.89 ft. to cor. No. 28, a porphyry rock 6 x 8 x 16 in. in size, marked 28–281, the same being cor. No. 3 of sur. No. 278, from which a blazed pine tree 14 in. in diameter bears N. 13° 46′ W. 29.8 ft. and a blazed pine tree 16 in. in diameter bears S. 58° 27′ E. 18 ft.;
6 thence from cor. No. 28 S. 40° E. 150 — to cor. No. 29, the same being cor. No. 4 of sur. No. 278, from which a blazed pine tree 16 in. in diameter bears S. 71° 22′ W. 19.3 ft. and a blazed pine tree 16 in. in diameter bears N. 22° 25′ E. 5.7 ft.; thence from cor. No. 29 N. 466.5 ft. to cor. No. 30, a porphyry rock 4 x 8 x 14 in. in size, marked 20–281, the same being cor. No. 5 of sur. No. 278, from which a pine tree 20 in. in diameter bears N. 87° 25′ W. 17.17 ft. and a blazed pine tree 12 in. in diameter bears N. 50° 10′ E. 29 ft.; thence from cor. No. 30 N. 40° W. 852.65 ft. to cor. No. 31, a porphyry rock 6 x 8 x 12 in. in size, marked 31–281, from which a blazed pine tree bears N. 57° 31′ E. 17 ft. and a blazed pine tree 14 in. in diameter bears N. 42° 16′ W. 12.9 ft.; thence from cor. No. 31 N. 18° W. 722.25 ft. to cor. No. 32, a porphyry rock 7 x 8 x 15 in. in size, marked 32–281; thence N. 46° E. 822 ft. to cor. No. 33, a porphyry rock 3 x 6 x 18 in. in size, marked 33–281; thence E. 189.29 ft. to cor. No. 34, a porphyry rock 3 x 4 x 8 in. in size, marked 34–381, from which a blazed pine tree 18 in. in diameter bears N. 33° 30′ E. 4 ft.; thence from cor. No. 34 N. 324.95 ft. to S. bank of California gulch, 374.95 ft. to stream in said gulch, 409.95 ft. to N. bank of said gulch, 464.95 ft. to county road, 474.95 ft. to the place of beginning, containing 193.43 acres of land, more or less.

2nd. That the said plaintiff company claims an estate of inheritance in fee-simple in and to said premises.

3rd. That the said plaintiff company is now and was at the times above and hereinafter mentioned entitled to the immediate and exclusive possession of the above-described land and premises.

4th. That while the said plaintiff Co. was so the owner of and seized and possessed and entitled to the possession of the
7 said land and premises the said defendants afterwards and on, to wit, the 1st day of May, 1884, entered upon a portion of said mining land and premises, to wit, the northwest portion of the said above-described premises, at and near the north and east line of said premises, and then and there took possession of that portion of said mining land and premises and wrongfully and un-

lawfully ousted the plaintiff company therefrom, and from thence hitherto have unlawfully and wrongfully restrained and withheld and still do wrongfully and unlawfully retain the same and the possession thereof from the said plaintiff Co.; that the value of that portion of the said mining land and premises from which said plaintiff company has been so ousted by the said defendants and which they still unlawfully detain from the plaintiff company is over fifty thousand dollars ($50,000), and the rents, issues, and profits thereof while the defendants have so taken and held possession of the same and the damage of such detention is ten thousand (10,000) dollars, and the plaintiff company has thereby been damaged in the sum of ten thousand (10,000) dollars.

Wherefore the plaintiff company demands judgment against the said defendants (1) for the recovery of the possession of the said demanded premises and (2) for the sum of ten thousand dollars damages, and for the costs of this action.

(Signed) G. G. SYMES,
Att'y for Pl'ff. Co.

(Endorsed:) No. 1524. In U. S. circuit court. The Iron Silver Mining Co. *vs.* Joseph Reynolds *et al.* Complaint. Filed
8 May 7, 1884. (Signed) Edward F. Bishop, clerk. G. G. Symes, att'y for pl'ff.

And the said summons is in words and figures as follows, to wit:

Summons.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

THE IRON SILVER MINING COMPANY, Plaintiff,
versus
JOSEPH REYNOLDS and J. D. MORRISSEY, Defendants.

Complaint filed in the clerk's office this 8th day of May, A. D. 1884.

The President of the United States of America to Joseph Reynolds and J. D. Morrissey, Greeting:

You and each of you are hereby notified that an action has been brought in said court by the Iron Silver Mining Company, plaintiff, against you, as defendants, to recover the possession of certain specific real property situate in California mining district, county of Lake and State of Colorado, consisting of 193.43 acres of land, more or less, and more particularly described by metes and bounds
9 in the complaint filed herein, and to which reference is here made, together with the sum of $10,000 damages for the ouster and possession of a portion of said premises by defendants and for the costs of this suit, as more fully set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the

complaint filed in said action in said court within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe, otherwise within forty days from the day of service; and if you fail so to do the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 7th day of May, A. D. 1884, and of the Independence of the United States the 108th year.

[Seal U. S. Cir. C't, Dist. of Colo.]

(Signed) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Proof of Service.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss*:

LEADVILLE, *May 10th, A. D.* 1884.

I hereby certify that I received the within writ on the 10th day of May, A. D. 1884, and that I have personally served the same upon the said defendant, J. D. Morrissey, by delivering to J. D. Morrissey personally a true copy of the within writ at the time and place as follows: As to J. D. Morrissey, at Leadville, county of Lake, on the 10th day of May, A. D. 1884; as to Joseph Reynolds, not found in my district.

This writ therefore returned partly executed as the law directs, this 2nd day of June, A. D. 1884.

(Signed) WALTER A. SMITH, *Marshal*,
By DAVID A. COWELL,
Deputy Marshal.

(Endorsed:) Gen. No. 1524. Circuit court of the United States for the district of Colorado. Iron Silver Min'g Co., plaintiff, *versus* Joseph Reynolds *et al.*, defendants. Summons. Filed this 2 day of June, A. D. 1884. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. G. G. Symes, of Denver, attorney for plaintiff.

And afterwards and on, to wit, the 7th day of October, A. D. 1884, came the said defendants, by Morrison and Wenzell, their attorneys, and filed in said court and in said cause their answer to the complaint herein.

And the said answer is in words and figures as follows, to wit:

11 *Answer.*

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States, District of Colorado.

THE IRON SILVER MINING COMPANY, Plaintiff,

vs.

JOSEPH REYNOLDS and JOHN D. MORRISSEY, Defendants,

The defendants, answering the complaint, say:

For a first defense—

1. They deny that on the first day of January, A. D. 1884, or at any time, the plaintiff company was or is the owner or seized or possessed of the premises described in the complaint.

2. They deny that the said plaintiff claims or has an estate in fee-simple or other estate in said premises, or at the times charged in the complaint or at any time was or is entitled to the possession, immediate, exclusive, or otherwise, of the said described land and premises. They deny that the defendants have wrongfully or unlawfully ousted the plaintiff company from, or have unlawfully retained or withheld, or do now wrongfully or unlawfully retain the said premises or the possession thereof, from the plaintiff company. They deny that the value of the rents, issues, and profits mentioned in the complaint amount to the sum of ten thousand dollars or any sum, and deny that the plaintiff company has been damaged in the sum of ten thousand dollars or in any sum, or at all.

For a second defense—

12 1. The defendants say that at all times charged in the complaint the defendant, Joseph Reynolds. was and still is the owner and seized in fee of and in the actual possession of the Crown Point Lode mining claim survey, lot No. 3241, and the Pinnacle Lode mining claim survey, lot No. 259, which adjoins on its north side said placer claim described in the complaint, and that the vein or veins in said several lode mining claims in their course downwards dip into and underneath the exterior lines of the Wells and Moyer placer claim in the said complaint described.

2. That in following and working said vein or veins the defendant, Joseph Reynolds, as owner as aforesaid, and the defendant, John D. Morrissey, under the license of the said Joseph Reynolds, have entered underneath the exterior surface lines of said placer claim, following the said veins as parcel of the premises embraced and included in said several survey lots, and have not otherwise entered upon the premises described in the complaint or claimed by plaintiff as the said Wells and Moyer placer claim, or ousted the plaintiff from the possession thereof.

For a third defense—

1. That at the time of the survey, entry, and patenting of the said Wells and Moyer placer claim a certain lode, vein, or deposit of

quartz or other rock in place carrying carbonates of lead and silver-bearing ore, and of great value, called the Pinnacle lode, and a certain lode, vein, or deposit carrying like minerals of great value were known and claimed to exist within the boundaries and underneath the surface of said placer claim survey, lot No. 281, and that the fact that such a vein or veins were claimed to exist and did exist, as afore-
13 said, within said premises was known to the patentees of said claim at all the times hereinbefore mentioned, and that in the application for patent for said placer claim the said vein or veins so known to exist were not included, and were, in the patent issued upon such application, expressly excluded therefrom.

2. And further in the said patent it was expressly and in terms reserved that the premises in and by such patent conveyed might, by the proprietor of any such vein or lode of quartz or other rock in place bearing mineral or ore as aforesaid, be entered for the purpose of extracting and removing the ore from such lode, vein, or deposit should the same or any part thereof be found to penetrate, intersect, pass through, or dip into the premises by such patent granted.

3. That the vein or deposit known as the Pinnacle lode and the vein or deposit known as the Crown Point lode were and had been at said times duly discovered, located, and of record by such names with surface grounds adjoining the exterior surface lines of said placer claim, and that the vein or veins in said lode claims then known to exist, afterwards and before the commencement of this suit and before the several dates charged in the complaint, became the property in fee of the defendant, Joseph Reynolds, and that said vein or veins upon their dip come underneath said exterior surface lines of said placer claim, and that the defendant, Joseph Reynolds, as owner and proprietor thereof, and the defendant Morrissey, by the license of such proprietor, have entered upon and followed said veins underneath said exterior surface lines of the Wells and Moyer placer claim and not otherwise; and that the entry of de-
14 fendants in following said veins upon their dip under said exterior surface lines is the only entry which the defendants or either of them have made upon or within the bounds of the so-called placer claim.

(Signed) MORRISON & WENZELL,
Att'ys for Defendants.

(Endorsed:) 1524. Iron Silver Co. *v.* Reynolds *et al.* Answer. Filed Oct. 7, 1884. (Signed) Edward F. Bishop, clerk. Morrison & Wenzell, Leadville.

And afterwards and on, to wit, the 7th day of November, A. D. 1884, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause its replication to the answer heretofore filed herein.

And the said replication is in words and figures as follows, to wit:

Replication.

In the Circuit Court of the United States for the District of Colorado.

THE IRON SILVER MINING COMPANY
against
JOSEPH REYNOLDS and JOHN D. MORRISSEY.

The said plaintiff company, for replication to the answer of the said defendants herein—

15 Denies that the said defendant, Joseph Reynolds, was at any time or still is the owner or seized in fee or in the possession of the Crown Point Lode mining claim or survey, lot No. 3241, or of the Pinnacle Lode mining claim or survey, lot No. 259; and denies that the vein or veins in the said last-alleged lode mining claim, or any veins or lodes in their course downward or otherwise, dip into or underneath the exterior lines of the said Wells and Moyer placer claim; and denies that the said defendants have not entered underneath the surface of said placer claim, except by following a vein or lode included in the said alleged lode claims on their dip; but plaintiff avers that they have entered upon the vein, lode, and mineral deposit lying underneath the surface of the said Wells and Moyer patented placer claim without in any way following the dip or downward course of any lode, vein, lead, or mineral deposit.

And plaintiff company denies that at the time of the survey or at the time of the entry or patenting of the said Wells and Moyer placer claim any certain lode, vein, or deposit of quartz or other rock in place carrying carbonates of lead and silver-bearing ore of any kind, called the Pinnacle lode, or any other lode, vein, or deposit carrying any valuable minerals, were known or claimed to exist within the boundaries or underneath the surface of the said placer claim or survey lot 281, or that any such alleged fact that such a vein or veins were claimed or known to exist within the said placer patented premises was known to the patentees of the said placer claims at such times; and denies that any such vein or veins or lodes, or any veins or lodes found within the said patented placer premises, were excluded or excepted from the said

16 patent or grant.

Plaintiff company denies that it was expressly or in terms or in any way reserved in said placer patent that the premises conveyed by the said placer patent might be entered by the proprietor of any lode or vein of quartz or other rock in place bearing any mineral or ore for the purpose of extracting or removing the ore from said lode, vein, or deposit, should the same or any part thereof be found to penetrate, pass through, or dip into the premises conveyed by such patent grant.

The plaintiff company avers that the said patent only reserved the right to grantees or owners of other lode claims to follow upon

the dip or downward course of any vein or deposit into or underneath the surface of the said patented placer premises when it shall appear that within such adjoining lode mining claims there was found developed and known to exist the top, apex, or outcrop of a vein, lode, or mineral deposit which upon its dip or downward course is found to penetrate, intersect, and underlie the surface of the said patented placer mining premises.

And plaintiff avers that within the said alleged Crown Point or Pinnacle Lode mining claims described in the said answer there is not found, there is not discovered, and there does not exist the top, outcrop, or apex of any lode, lead, or valuable mineral deposit; and there is no vein, lode, or valuable mineral deposit of any kind within the said alleged Crown Point or Pinnacle Lode mining claims which dip from the said lode claims into or underneath the said patented placer claim.

And plaintiff company denies that any vein, lode, or valuable mineral deposit known as the Pinnacle Lode and vein or as the Crown Point lode and vein, or any lode, vein, or mineral de-
17 posit whatever had been discovered, located, or recorded by any one whatever within the boundaries of the said Crown Point and Pinnacle Lode mining claims, or that any vein, lode, lead, or valuable mineral deposit was known to exist within the boundaries of the said alleged Crown Point and Pinnacle Lode claim before the commencement of this suit or before the date or time of the application of the said Wells and Moyer placer patent.

And denies that the said defendant, Joseph Reynolds, has become the owner or seized in fee or otherwise of any vein or lode or valuable mineral deposit which dips into or lies underneath the surface of the said patented placer mining claim, or that any such vein, lode, or lead or valuable mineral deposit is or was found within the exterior boundaries of the said alleged Crown Point and Pinnacle Lode mining claims.

And, for further replication herein, the said plaintiff company alleges:

That at all times heretofore charged in the answer of the said defendants it has been and still is the owner and seized in fee of and in the actual possession of the Rock Lode mining claim and the Dome Lode mining claim, which adjoin immediately on the north side the said alleged Pinnacle and Crown Point mining claims, and that within the exterior boundaries of the said Rock and Dome Lode mining claims there is a vein, lode, lead, and valuable mineral deposit of quartz and other rock in place bearing silver and lead, and which has its top, apex, and outcrop or highest end within the exterior boundary lines of the said Rock and Dome Lode mining claims, and which said lode, vein, lead, and valuable mineral deposit on its dip and downward course enters into and underlines
18 the land adjoining, a portion of which land adjoining consists of ground covered by the said alleged Crown Point and Pinnacle Lode mining claims.

And plaintiff company avers that any portion or part of any veins, lode, lead, or valuable mineral deposit of any kind which is found

or developed underneath the surface of the said Crown Point and Pinnacle Lode claims is a part and portion of the said Rock and Dome lodes, veins, and mineral deposits, which have their top, apex, and outcrop within the exterior boundary lines of the said Rock and Dome Lode mining claims, and which dips, as aforesaid, on their downward course into the said Pinnacle and Crown Point Lode mining claims.

Wherefore plaintiff company prays judgment as it has heretofore prayed in its said complaint.

(Signed) G. G. SYMES,
Att'y for Pl'ff Co.

(Endorsed:) No. 1524. In the circuit court of the U. S. The Iron S. M. Co. *vs.* Joseph Reynolds *et al.* Replication. Filed Nov. 7, 1884. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 17th day of November, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and
19 entered of record in said court and in said cause, to wit:

Order. Trial.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by G. G. Symes, Esq., its attorney, and the said defendants, by R. S. Morrison, Esq., their attorney, also come.

And thereupon comes a jury, to wit, Henry W. Betts, H. P. Heath, Edwin C. Currier, George M. McAdams, Charles Alger, Robert Harris, P. T. Hughes, Nelson G. Hurd, John L. Kester, William F. Hunt, Charles E. Davis, Nathan C. Hughes, twelve good and lawful men, and they are duly selected and tried, empaneled, and sworn to well and truly try the issue herein joined and a true verdict render according to the evidence; and thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause, or the matters at issue herein, or the evidence heard or any part thereof, nor listen to such conversation of others, are permitted to separate, to meet the court at its next incoming.

20 And afterwards and on, to wit, the 18th day of November, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding

was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued. Leave to Amend Complaint.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day come again the said parties, by their attorneys, respectively, and the said jurors being now all here present and in the jury box, the hearing of the evidence herein is resumed.

And thereupon the said plaintiff saith it will no further prosecute its suit in this behalf as to its claim for damages against the said defendants.

Wherefore it is considered by the court that the said defendants, as to said plaintiff's claim for damages herein, go hence hereof without day.

Upon motion of the said plaintiff it is ordered by the court that it have leave to amend its complaint herein as to the description of the premises claimed.

And the said jurors having heard the evidence produced and the instructions of the court, upon their oaths do say they find the issues for the plaintiff company, and that it is the owner in fee of the land described in the complaint and amendment thereto in this action, and entitled to recover the possession of the same.

21 And afterwards and on, to wit, the 18th day of November, A. D. 1884, came again the said plaintiff, by G. G. Symes, Esq., its attorney aforesaid, and filed in said court and in said cause its amendment to the complaint heretofore filed herein.

And the said amendment to complaint is in the words and figures as follows, to wit:

Amendment to Complaint.

In the Circuit Court of the United States for the District of Colorado, in the Eighth Circuit.

THE IRON SILVER MINING COMPANY
against
JOSEPH REYNOLDS *et al.*, Defendants.

The said plaintiff, The Iron Silver Mining Company, for amendments to the said complaint herein in this action filed, by leave of this court first had and obtained, amends the said complaint as follows, to wit:

Insert in the said complaint, beginning at line fifteen (15) on page six (6), after the following words, namely, containing 193 & $\frac{43}{100}$ acres of land, more or less, the following—that is to say: Saving and excepting out of the said patented tract of land the following pieces

or parcels thereof—that is to say, all that part of the said Wells and Moyer placer mining claim hereinabove described, being United States survey number 281, United States mineral entry and series of said land office number 155, and particularly described as follows, to wit:

22 Beginning at a point on the boundary line of said U. S. survey No. 281, between corners Nos. 28 and 29 thereof, whence said corner No. 28 bears N. 40° W. 483.4 feet, thence running south 18° E. 159.1 feet; thence W. 72° E. 6,427 feet to said boundary line; thence N. 40° W. 171.5 feet to place of beginning.

The plat and field-notes of survey being on file in the office of surveyor general for Colorado at Denver, Colorado, and to which reference is herein made, excepting and reserving from said survey No. 281 also the following-described parcel of said placer claim, for which said Wells and Moyer have executed a bond for a deed to George Hayes *et als.* and being a part of Wm. Redick lode, as claimed by them as above described, and the following bonded to John Thompson and described as follows, to wit: All that part of what is known as U. S. mineral survey No. 281 of the placer claim of Thos. S. Wells and William Moyer, and also as mining application No. 189, at the U. S. land office at Fair Play, Colorado, of the date of May 17th, 1878, which lies within the boundary lines of the Pennsylvania lode, ledge, or deposit, described, located, and owned by the said John Thompson, excepting and reserving to themselves, the parties of the first part, forever the full right, title, and interest in and to all surface soil, gravel, or, in other words, placer diggings, which they may discover on the piece of land hereby conveyed, which is more particularly described as follows, to wit:

Beginning at corner No. 9 of said Wells and Moyer placer mining claim, a granite stone, marked 9–281, thence N. 72° 8′ E. in the direction of cor. No. 8, survey 281, 189 feet to the intersection of said line with the east boundary line of Pennsylvania lode; thence N. 6° 8′ W. 92 feet to cor. No. 4 of the Pennsylvania lode; thence S. 83° 55′ W. 300 feet to N. W. corner No. 1 of Pennsylvania lode,

23 a pine post 4 x 4 x 4 feet long; thence S. 6° 8′ E. along the west side line of the Pennsylvania lode 599½ feet to the intersection of said line with the line from corner No. 10 to cor. No. 11, survey No. 281; thence N. 39° 56′ E. 102.5 feet to corner No. 10, survey No. 281; thence due north to corner No. 9, survey 281, the place of beginning.

Variation in all courses 15° east; and also excepting and reserving the following-described parcel of land embraced in said survey No. 281:

Beginning at corner No. 1, a stake in mound of stones, from which corner No. 7 of survey No. 281 bears N. 56° E. 542 feet, thence from said corner No. 1 W. 100 feet to corner No. 2; thence from corner No. 2 N. 300 feet to corner No. 3; thence from corner No. 3 E. 100 feet to corner No. 4; thence from corner No. 4 S. 300 feet to place of beginning.

Variation in all courses 15° E., containing 0.6887 acres.

And also excluding and reserving from said Wells & Moyer placer

mining claim survey No. 281 the following-described parcel of said placer mining claim, for which said Wells & Moyer have executed a bond for a deed to J. B. S. McCreagh, James McPhelemy, & A. Donath, said tract being described as follows, to wit:

Beginning at S. W. corner of "Genessee lode," thence N. 40° W. 880.97 feet to intersection with south of Pinnacle lode; thence N. 65° 15′ E. 292.15 feet to corner 25–281; thence 50° W. 310 feet to corner 26–281; thence S. 65° W. 198.13 feet to corner 27–281; thence N. 409.85 feet to corner 28–281; thence S. 40° E. 1,117.3 ft. to S. E. corner of Gresee lode; thence S. 4′ 66.5 feet to the place of beginning, containing 6.02 acres, more or less.

And also excluding and reserving from said Wells and
24 Moyer placer mining claim survey No. 281 the following-described parcel of said placer claim, for which said Wells & Moyer have executed a bond for a deed to Ed. B. Hepburn *et als.*, provided said Hepburn *et als.* shall strike a vein of ore in rock in place on said premises before the first day of April next, said parcel of land being described as follows, to wit:

From corner No. 1, N. E. corner of "Nisi Prius" lode, thence N. 55° 20′ E. 300 feet to corner No. 2; thence northwesterly about 1,066 feet to corner No. 18, survey No. 281, same as southeast corner of "Pinnacle" lode; thence westerly 300 feet to corner No. 17, survey No. 281, same as S. W. corner of "Pinnacle;" thence southerly about 1,066 feet to place of beginning; the exterior boundaries of the said Wells and Moyer placer mining claim survey No. 281 being as follows, to wit:

Variation in all courses 15° east. Beginning at corner No. 1, a porphyry rock 5 x 6 x 9, "set 7" deep and marked 1–281, on N. side of "California gulch," just above the mouth — Nugget gulch, from which a U. S. L. M. No. 1 bears N. 73° 1′ 36″ W. 10,870.63 feet and the peak of Bald mountain bears S. 65° 35′ E., thence S. 79° 28′ E. 390.5 ft. to corner No. 2; thence S. 58° 8′ E. 721 feet to corner No. 3; thence S. 25° 4′ W. 681 feet to corner No. 4; thence S. 66° 8′ E. 738 feet to corner No. 5; thence S. 29° 48′ W. 133 feet to corner No. 6; thence north 72° 50′ W. 250 ft. to corner No. 7; thence S. 20° 48′ W. 845 feet to cor. No. 8; thence S. 72° 8′ W. 200 feet to corner No. 9; thence S. 400 feet to cor. No. 10; thence S. 39° 56′ W. 750 feet to cor. No. 11; thence W. 1,271 feet to cor. No. 12; thence S. 1,164.10 feet to cor. No. 13; thence W. 3,594.16 feet to cor. No. 14;
thence N. —° 26′ W. 1,138.69 ft. to cor. No. 15; thence E. 590
25 feet to cor. No. 16; thence N. 65° 15′ E. 527 ft. to cor. No. 17; thence S. 50° E. 472.47 ft. to cor. No. 18; thence N. 65° E. 531.29 ft. to cor. No. 19; thence S. 190 ft. to cor. No. 20; thence E. 300 ft. to cor. No. 21; thence N. 329.89 ft. to cor. No. 22; thence N. 65° E. 152.7 ft. to cor. No. 23; thence S. 50° E. 8.66 ft. to cor. No. 24; thence N. 65 15′ E. 300 feet to cor. No. 25; thence N. 50 W. 310 ft. to cor. No. 26; thence S. 63° W. 198.52 ft. to cor. No. 27; thence N. 409.85 feet to cor. No. 28; thence S. 40° E. 1,500 ft. to cor. No. 29; thence N. 466.5 feet to cor. No. 30; thence N. 40° W. 852.65 ft. to cor. No. 31; thence N. 18° W. 772.25 ft. to cor. No. 32; thence

N. 46° E. 822 ft. to cor. No. 33; thence E. 189.29 ft. to cor. No. 34; thence 474.95 ft. to cor. No. 1, the place of beginning.

And the said plaintiff company alleges that it is the owner and seized of all of the said land included within the exterior boundaries of the said patented placer claim survey, lot No. 281, except the portions *and* thereof last hereinabove particularly described, and the owner of all the leads, lodes, ledges, and valuable mineral deposits of every kind and character and all the mineral bearing rock and earth, ores, and metals therein found.

(Signed) G. G. SYMES,
Att'y for Pl'ff Co.

(Endorsed:) No. 1524. In U. S. circuit court. The Iron Silver Mining Company *vs.* Joseph Reynolds *et al.* Amendment to complaint. Filed Nov. 18, 1884. (Signed) Edward F. Bishop, clerk.

26 And afterwards and on, to wit, the 29th day of December, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause to wit:

Order. Judgment.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by G. G. Symes, Esq., its attorney, and the said defendants, by R. S. Morrison, Esq., their attorney, also come.

And the motion of the said defendants for a new trial herein, coming on now to be heard, is argued by counsel; and, the court being now sufficiently advised in the premises, it is ordered by the court that the said motion be denied upon this condition, nevertheless, that if the said defendants or any of them shall remove this cause into the Supreme Court of the United States and shall desire to submit the same to the said Supreme Court under and in pursuance to the 20th rule of practice in the said Supreme Court, then and in that case the said plaintiff shall join in such submission and proceed according to the terms of said rules; and, failing in that regard, this court shall be at liberty at any term thereafter to vacate and set aside all orders made in this cause on this day and the judgment now to be entered, to which the said plaintiff, by its counsel, now assents.

27 Wherefore let judgment be entered upon the verdict of the jury herein in favor of the said plaintiff and against the said defendants for the possession of the premises described in the complaint and the said plaintiff's costs, to be taxed.

And thereupon and on the same day, to wit, the 29th day of December, A. D. 1884, judgment was duly entered against the said defendants in the judgment book of said court, in pursuance to the statutes and rules of said court.

And the said judgment is in words and figures as follows, to wit:

Judgment.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

On this 29th day of December, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court, there being present the Honorable Moses Hallett, district judge, it is considered by the court that the said plaintiff do have and recover of and from the said defendants possession of the property, lands, and tenements in said complaint described, to wit: That certain tract of land and mining claim situated in California mining district, county of Lake and State of Colorado, consisting of one hundred and ninety-three and forty-three one-hundredths (193.43) acres of land, more or less, and more particularly described by
28 metes and bounds in the United States patent issued therefor as follows, with magnetic variation of fifteen (15) degrees east, to wit:

Beginning at cor. No. 1, a porphyry rock 5 x 6 x 9 in. in size, marked 1–281, from which U. S. locating monument No. 1 bears N. 73° 1′ 36″ W. at 10,870 and 63,100 ft. and the peak of Bald Mt. bears S. 65° 35′ E., thence from cor. No. 1 S. 79° 28′ E. 590.5 ft. to cor. No. 2, a porphyry rock 5 x 7 x 12 in. in size, marked 2–281; thence S. 58° 8′ E. 436 ft. to road, 721 ft. to cor. No. 3, a granite rock 5 x 7 x 13 in. in size, marked 3–281; thence S. 25° 4′ W. 68 ft. to cor. No. 4, a granite rock 7 x 8 x 8 in. in size, marked 4–281; thence S. 66° 8′ E. 733 ft. to cor. No. 5, a granite rock 7 x 11 x 13 in. in size, marked 5–281; thence S. 29° 48′ W. 30 ft. to N. bank of California gulch, 66 ft. to stream, 90 ft. to S. bank of California gulch, 133 ft. to cor. No. 6, a quartz rock 8 x 11 x 12 in. in size, marked 6–281; thence N. 72° 50′ W. 250 ft. to cor. No. 7, a quartz rock 6 x 8 x 12 in. in size, marked 7–281; thence S. 20° 48′ W. 240 ft. to N. bank of Eureka gulch, 550 ft. to S. bank of said gulch, 845 ft. to cor. No. 8, a porphyry rock 7 x 9 x 12 in. in size, marked 8–281; thence S. 72° 8′ W. 200 ft. to cor. No. 9, a porphyry rock 5 x 7 x 10 in. in size, marked 9–281; thence S. 400 ft. to cor. No. 10, a quartz rock 5 x 6 x 10 in. in size, marked 10–281, from which a blazed pine tree 13 in. in diameter bears N. 32° 10′ E. 8.3 ft. and a pine 14 in. in diameter, blazed & marked 10–281, bears S. 71° 38′ E. — ft.; thence from cor. No. 10 S. 39° 56′ W. 750 ft. to cor. No. 11, a quartz rock 4 x 8 x 11 in. in size, marked 11–281, from whence a pine tree 16 in. in diameter, blazed and marked 11–281, bears N. 62° 12′ E. 12 ft. & a pine tree 9 in. in diameter, blazed and marked 11–281, bears S. 15° 21′ E.

8.10 ft.; thence from said cor. No. 11 W. 128.71 ft. to cor. No. 12, a granite rock 5 x 7 x 11 in. in size, marked 12–281, from which a pine tree 13 in. in diameter blazed & marked 12–281, bears S. 5° 13′ E. 16.2 ft. and a pine tree 11 in. in diameter, blazed and marked 12–281, bears S. 59° 8′ — 14.8 ft.; thence from cor. No. 12 S. 11,004.1 ft. to cor. No. 13, a granite rock 5 x 11 x 14 in. in size, from which Mt. Sheridan bears S. 73° 36′ E.; monument on Mt. Elbert bears S. 54° 46′ W.; a pine tree 9 in. in diameter, blazed & marked 13–281, bears S. 24° 3′ W. 10.5 ft., and a pine tree 5 in. in diameter, blazed & marked —, bears N. 77° 47′ W. 13 ft.; thence from cor. No. 13 W. 3,590.16 ft. to cor. No. 14, a granite rock 5 x 10 x 14 in. in size, marked 14–281, from which a pine tree 11 in. in diameter, blazed & marked 14–281, bears N. 29° 32′ E. 11.2 ft. & a blazed pine tree 12 in. in diameter, marked 14–281, bears N. 71° 25′ W. 31 ft.; thence from cor. 14 26′ W. 1,138 69 to cor. No. 15, a quartz rock 5 x 7 x 9 in. in size, marked 15–281, from which a blazed pine tree 17 in. in diameter bears N. 65° 15′ W. at 11.01 ft.; a double pine tree, blazed & marked 15–281, bears S. 19° 10′ E. 10 ft.; thence from cor. No. 15 E. 590 ft. to cor. No. 16, a porphyry rock 7 x 8 x 11 in. in size, marked 16–281, the same being cor. No. 3 of sur. No. 336; thence N. 65° 15′ E. along the southerly boundary of said sur. 236 527 ft. to cor. No. 17, a porphyry rock 5 x 12 x 12 in. in size, marked 17–281, the same being cor. No. 1 of sur. No. 259; thence S. 50° E. 472.47 ft. to cor. No. 18, a granite rock 3 x 8 x 14 in. in size, marked 18–281, the same being cor. No. 2 of said sur. No. 259; thence N. 65° E. 531.29 ft. to cor. No. 19, a granite rock 5 x 5 x 15 in. in size, marked 19–281; thence S. 190 ft. along the western boundary of the Oro La Plata lode to cor. No. 20, a granite rock 6 x 6 x 18 in. in size, marked 20–281, from which a blazed pine tree 7 in. in diameter bears N. 19° 30′ E. 5.5 ft. & a blazed pine tree 12 in. in diameter bears S. 80° 30′ W. 19 ft.; thence from cor. No. 20 E. along the S. boundary of said Oro La Plata lode 30 ft. to cor. No. 21, a granite rock 6 x 7 in. in size, marked 21–281, from which a blazed pine tree 14 in. in diameter bears N. 72° 6′ E. 21.1 ft. and a blazed pine 6 in. in diameter bears N. 35° 33′ E. 12.8 ft.; thence from cor. No. 21 N. along the E. boundary of said Ora La Plata lode 399.89 ft. to cor. 22, a quartz rock 6 x 6 x 9 in. in size, marked 22–281; thence N. 65° E. 152.7 ft. to cor. 23, a lime rock, marked 23–281, the same being cor. No. 3 of sur. No. 259, from which a blazed pine tree 14 in. in diameter bears S. 72° 4′ E. 11.8 ft. & a blazed pine tree 10 in. in diameter bears N. 16° 30′ E. 26 ft.; thence from cor. No. 23 S. 50° E. 8.66 ft. to cor. No. 4, a granite rock marked 24–281, the same being cor. No. 4 of sur. No. 259, from which a blazed pine tree 13 in. in diameter bears N. 1° 12′ E. 30.7 ft.; thence from cor. No. 24, N. 65° 15′ E. 300 ft. to cor. No. 25, a granite rock, marked 25–281, the same being No. 25 of sur. No. 259, from which a blazed pine tree 18 in. in diameter bears N. 89° 20′ W. 12.5 ft., and a blazed pine tree 15 in. in diameter bears S. 4 ft.; thence from cor. No. 25, 50° W. 310 ft. to cor. No. 26, a granite rock 5 x 9 x 12 in. in size, marked 26–281, the same being cor. No. 26 of sur. No. 259, from which a blazed pine tree 16 in. in diameter

bears S. 10° 31′ W. 33 ft. & a blazed pine tree 13 in. in diameter bears S. 45° 42′ W. 15.2 ft.; thence from cor. No. 26 S. 65° W. 198.52 ft. to cor. No. 27, a granite rock 7 x 9 x 11 in. in size, marked 27–281, from which a blazed pine tree 14 in. in diameter bears N. 19° 50′ E. 6 ft., a blazed pine tree 12 in. in diameter bears N. 72° 24′ W. at 27.5 ft.; thence from cor. No. 27 N. 409.89 ft. to cor. No. 26, a porphyry rock 6 x 8 x 16 in. in size, marked 28–281, the same being cor. No. 3 of sur. No. 278, from which a blazed pine tree 14 in. in diameter bears N. 13° 46′ W. 29.8 ft. and a blazed pine tree 16 in. in diameter bears S. 58° 27′ E. 18 ft.;
31 thence from cor. No. 28 S. 40° E. 150 to cor. No. 29, the same being cor. No. 4 of sur. No. 278, from which a blazed pine tree 16 in. in diameter bears S. 71° 32′ N. 19.3 ft. and a blazed pine tree 16 in. in diameter bears N. 22° 25′ E. 5.7 ft.; thence from cor. No. 29 N. 466.5 ft. to cor. No. 30, a porphyry rock 4 x 8 x 14 in. in size, marked 30–281, the same being cor. No. 3 of sur. No. 277, from which a pine tree 20 in. in diameter bears N. 37° 25′ W. 17.17 ft., and a blazed pine tree 12 in. in diameter bears N. 50° 10′ E. 29 ft.; thence from cor. No. 30 N. 40° W. 852.66 ft. to cor. No. 31, a porphyry rock 6 x 8 x 12 in. in size, marked 31–281, from which a blazed pine tree bears N. 57° 31′ E. 17 ft. and a blazed pine tree 14 in. in diameter bears N. 42° 16′ W. 12.9 ft.; thence from cor. No. 81 N. 18 W. 722.25 ft. to cor. No. 32, a porphyry rock 7 x 8 x 15 in. in size, marked 32–281; thence N. 46 E. 822 ft. to cor. No. 33, a porphyry rock 3 x 6 x 18 in. in size, marked 33–281; thence E. 189.29 ft. to cor. No. 34, a porphyry rock 3 x 4 x 8 in. in size, marked 34–281, from which a blazed pine tree 18 in. in diameter bears N. 33° 30′ E. 4 ft.; thence from cor. No. 34 N. 324.95 ft. to S. bank of California gulch 374.95 ft. to stream in said gulch, 409.95 ft. to N. bank of said gulch, 464.95 ft. to county road, 474.95 ft. to the place of beginning, containing 193.43 acres of land, more or less, saving and excepting out of the said patented tract of land the following pieces or parcels thereof—that is to say, all that part of the said Wells and Moyer placer mining claim hereinabove described, being United States survey numbered 281, United States mineral entry and series of said land office number 155, and particularly described as follows, to wit: Beginning at a point on the boundary line of said U. S. survey No. 281 between corners No. 28 and 29 thereof whence said corner No. 28 bears N. 40° W.
32 483.4 feet, thence running south 18° E. 159.1 feet; thence N. 72° E. 6,427 feet to said boundary line; thence N. 40° W. 171.5 feet to place of beginning, the plat and field-notes of survey being on file in the office of surveyor general for Colorado, at Denver, Colorado, and to which reference is herein made, excepting and reserving from said survey No. 281 also the following-described parcel of said placer claim, for which said Wells and Moyer have executed a bond for a deed to George Hayes *et als.*, and being a part of Wm. Redick lode, as claimed by them as above described, and the following bonded to John Thompson, and described as follows, to wit: All that part of what is known as U. S. mineral survey No. 281 of the placer claim of Thos. S. Wells and William Moyer,

and also as mining application No. 189, at the U. S. land office at Fair Play, Colorado, of the date of May 17th, 1878, which lies within the boundary lines of the Pennsylvania lode, ledge, or deposit, described, located, and owned by the said John Thompson, excepting and reserving to themselves, the parties of the first part, forever the full right, title, and interest in and to all surface soil, gravel, or, in other words, placer diggings, which they may discover on the piece of land hereby conveyed, which is more particularly described as follows, to wit: Beginning at corner No. 9 of said Wells and Moyer placer mining claim, a granite stone marked 9–281, thence N. 72° 8′ E., in the direction of cor. No. 8, survey 281, 1.89 feet, to the intersection of said line with the east boundary line of Pennsylvania lode; thence N. 6° 8′ W. 92 feet to cor. No. 4 of the Pennsylvania lode; thence S. 83° 52′ W. 300 feet to N. W. corner No. 1 of Pennsylvania lode, a pine post 4 x 4 x 4 feet long; thence S. 6° 08′ E. along the west side line of the Pennsylvania lode 599, ½ feet to the intersection of
33 said line with the line from corner No. 10 to cor. No. 11, survey No. 281; thence N. 39° 56′ E. 102.5 feet to corner No. 10, survey No. 281; thence due north to corner No. 9, survey 281, the place of beginning; variation in all courses 15° east; and also excepting and reserving the following-described parcel of land embraced in said survey No. 281: Beginning at corner No. 1 a stake in mound of stones from which corner No. 7, of survey No. 281, bears N. 56° E. 542 feet, thence from said corner No. 1 W. 100 feet to corner No. 2; thence from corner No. 2 N. 300 feet to corner No. 3; thence from corner No. 3 E. 100 feet to corner No. 4; thence from corner No. 4 S. 300 feet to place of beginning—variation in all courses 15° E.—containing 0.6887 acres; and also excluding and reserving from said Wells & Moyer placer mining claim survey No. 281 the following-described parcel of said placer mining claim for which said Well & Moyer have executed a bond for a deed to J. B. S. McCreagh, James McPhelemy, and A. Donath, said tract being described as follows, to wit: Beginning at S. W. corner of "Genesee lode;" thence N. 40° W. 880.97 feet to intersection with south of Pinnacle lode; thence N. 65° 15′ E. 292.15 feet to corner 25–281; thence N. 50° W. 310 feet to corner 26–281; thence S. 65° W. 198.53 feet to corner 27–281; thence N. 409.85 feet to corner 28–281; thence S. 40° E. 1,117.3 ft. to S. E. corner of Gresee lode; thence S. 4′ 66.5 feet to the place of beginning, containing 6.02 acres, more or less; and also excluding and reserving from said Wells and Moyer placer mining claim survey No. 281 the following-described parcel of said placer claim, for which said Wells and Moyer have executed a bond for a deed to Ed. B. Hepburn *et als.*, provided said Hepburn *et als.* shall strike a vein of ore in rock in place on said premises before the first day
34 of April next, said parcel of land being described as follows, to wit: From corner No. 1, N. E. corner of "Nisi Prius" lode, thence N. 55° 20′ E. 300 feet to corner No. 2; thence northwesterly about 1,066 feet to corner No. 18, survey No. 281, same as southeast corner of "Pinnacle" lode; thence westerly 300 feet to

corner No. 17, survey No. 281, same as S. W. corner of "Pinnacle;" thence southerly about 1,066 feet to place of beginning. The exterior boundaries of the said Wells and Moyer placer mining claim survey No. 281 being as follows, to wit: Variation in all courses 15° east. Beginning at corner No. 1 a porphry rock 5 x 6 x 9 set 7" deep, and marked 1–281, on N. side of "California gulch" just above the mouth — Nugget gulch, from which a U. S. L. M. No. 1 bears N. 73° 1′ 36″ W. 10,890.63 feet, and the peak of Bald Mountain bears S. 65° 35′ E.; thence S. 79° 28′ E. 390.5 ft. to corner No. 2; thence S. 58° 8′ E. 721 feet to corner No. 3; thence S. 25° 4′ W. 681 feet to corner No. 4; thence S. 66° 8′ E. 738 feet to corner No. 5; thence S. 29° 48′ W. 133 feet to corner No. 6; thence north 72° 50′ W. 250 ft. to corner No. 7; thence S. 20° 48′ W. 845 feet to corner No. 8; thence S. 72° 8′ W. 200 feet to corner No. 9; thence S. 400 feet to corner No. 10; thence S. 39° 56′ W. 750 feet to cor. No. 11; thence W. 1,271 feet to cor. No. 12; thence S. 1,164.10 feet to corner No. 13; thence W. 3,594.16 feet to cor. No. 14; thence no° 26′ W. 1,138.69 ft. to cor. No. 15; thence E. 590 feet to cor. No. 16; thence N. 65° 15′ E. 527 ft. to cor. No. 17; thence S. 50° E. 472.47 ft. to cor. No. 18; thence N. 65° E. 531.29 ft. to cor. No. 19; thence S. 190 ft. to cor. No. 20; thence E. 300 ft. to cor. No. 21; thence N. 329.89 ft. to cor. No. 22; thence N. 65° E. 152.7 ft. to cor. No. 23; thence S. 50° E. 8.66 ft. to cor. No. 24; thence N. 65° 15′ E. 300 ft. to cor. No. 25; thence N. 50° W. 310 ft. to cor. No. 26; thence S. 63° W. 198.52 ft. to cor. No. 27; thence N. 409.85 feet to cor. No. 28; thence S. 40° E. 1,500 ft. to cor. No. 29; thence N. 466.5 feet to cor. No. 30; thence N. 40° W. 852.65 ft. to cor. No. 31; thence N. 18° W. 772.25 ft. to cor. No. 32; thence N. 46° E. 822 ft. to cor. No. 33; thence E. 189.29 ft. to cor. No. 34; thence — 474.95 ft to cor. No. 1, the place of beginning, and that it have a writ of possession therefor.

It is further considered by the court that the said plaintiff do have and recover of and from the said defendants its costs by it in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 31st day of December, A. D. 1884, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Time for Bill of Exceptions.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day it is ordered by the court that day until ten (10) days from this day is allowed the said defendants in which to file herein their bill of the exceptions reserved by them upon the trial of the issues herein joined.

36 And afterwards, and on, to wit, the 15th day of January, A. D. 1885, the same being one of the regular juridical days of the October term, A. D. 1884, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. As to Bill of Exceptions.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day it is ordered by the court that the bill of exceptions of the said defendants, filed herein on the 14th instant, be considered as filed in due time.

And afterwards and on, to wit, the 6th day of November, A. D. 1886, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Motion to Amend Original Complaint Denied.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by F. W. Owers, Esq., its attorney, and the said defendants, by C. S. Thomas, Esq., their attorney also come.

37 And the motion of the said plaintiff to amend the original complaint herein having heretofore come on to be heard, and having been submitted to the court and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

And afterwards and on, to wit, the 22nd day of January, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day comes the said plaintiff, by F. W. Owers, Esq., its attorney, and the said defendants, by C. S. Thomas, Esq., their attorney, also come.

And thereupon comes a jury, to wit, Benjamin F. Spinney, J. F. Tucker, James F. Benedict, William H. Armsby, Joseph Coykendall, Henry A. Holme, John Gray, David E. Appel, James Cowie, Day B. Hoyt, J. R. Buckley, D. B. Wyatt, twelve good and lawful men; and they are duly selected and tried, impaneled, and
38 sworn to well and truly try the issues herein joined and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause, or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

And afterwards and on, to wit, the 24th day of January, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day come again the said parties, by their attorneys, respectively.

And the said jurors being now all here present and in the jury box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the
39 court not to converse among themselves or with others touching this cause, or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

And afterwards and on, to wit, the 25th day of January, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day come again the said parties, by their attorneys, respectively.

And the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue therein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

40 And afterwards and on, to wit, the 26th day of January, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Trial Continued.

THE IRON SILVER MINING COMPANY.
vs.
JOSEPH REYNOLDS and JOHN D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day come again the said parties, by their attorneys, respectively.

And the said jurors being now all here present and in the jury-box, the hearing of the evidence herein is resumed and continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein, or the evidence heard or any part thereof, nor to listen to such conversation of others, are permitted to separate to meet the court at its next incoming.

And afterwards and on, to wit, the 27th day of January, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable

Moses Hallett, district judge—the following further proceed-
41 ing was had and entered of record in said court and in said cause, to wit:

Ordr. Trial Continued.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day come again the said parties, by their attorneys, respectively.

And the said jurors heretofore impaneled and sworn in this cause being now all here present and in the jury-box, the trial of the issues herein joined is resumed.

And the said jurors having heard the evidence produced herein and the instructions of the court, retire to their room, under charge of a sworn bailiff, to consider of their verdict.

And afterwards and on, to wit, the 28th day of January, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Verdict.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

At this day come again the said parties, by their attorneys, respectively.

42 And thereupon come again the said jurors and on their oaths do say they find for the defendants.

And afterwards and on, to wit, the 29th day of January, A. D. 1887, came the said plaintiff, by its attorney aforesaid, and filed herein its motion for a new trial of the issues herein joined.

And said motion is in the words and figures as follows, to wit:

Motion for New Trial.

UNITED STATES OF AMERICA, *State of Colorado:*

In the Circuit Court of the United States for the District of Colorado.

THE IRON SILVER MINING COMPANY, Plaintiff,

vs.

JOSEPH REYNOLDS *et al.*, Defendants.

And now comes the plaintiff and moves the court to set aside the verdict and grant a new trial herein for the reasons following, to wit:

1. The court erred in receiving and admitting evidence against the objection of the plaintiff.

2. The court erred in rejecting evidence offered by the
43 plaintiff.

3. The court erred in its charge to the jury.

4. The court erred in refusing to instruct the jury as requested by the plaintiff.

5. The verdict is against law.

6. The verdict is against the evidence & unsupported by the same.

(Signed) L. S. DIXON,
E. O. WOLCOTT,
FRANK H. OWERS,
Plaintiff's Attorneys.

(Endorsed:) 1524. U. S. circuit court, district of Colorado. The Iron Silver Mining Co. *vs.* Joseph Reynolds *et al.* Motion for a new trial. Filed Jan. 29, 1887. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 11th day of March, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1886, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order. Motion for New Trial Denied. Judgment. Bill of Exceptions.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY. } 1524.

Action for possession of specific real property and for damages.

44*a* At this day comes the said plaintiff, by L. S. Dixon, Esq., its attorney, and the said defendants, by T. M. Patterson, Esq., their attorney, also come.

And the motion of the said plaintiff for a new trial of the issues herein joined having heretofore come on to be heard, and having

been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore it is considered by the court that the said defendants go hence hereof without day and have and recover of and from the said plaintiff their costs by them in this behalf laid out and expended, to be taxed, and have execution therefor.

And on its motion day until sixty (60) days from this day is allowed the said plaintiff within which time to file herein its bill of exceptions reserved by it upon the trial of the issues herein joined, and let supersedeas bond upon writ of error herein be in the sum of one thousand dollars ($1,000.00).

And afterwards and on, to wit, the 2nd day of April, A. D. 1887, came again the said plaintiff, by F. W. Owers, Esq., its attorney, and sued out of said court in said cause its writ of error and citation to the Supreme Court of the United States.

And the said writ or error and citation are in the words and figures as follows, to wit:

44*b* *Writ of Error to Supreme Court U. S., District of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court between the Iron Silver Mining Company, plaintiff, and Joseph Reynolds and John D. Morrissey, defendants, a manifest error hath happened, to the great damage of the said The Iron Silver Mining Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of April, in the year of

our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 111th year.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

Allowed by—
MOSES HALLETT,
District Judge.

[Endorsed:] Gen. No. 1524. Circuit court of the United States. The Iron Silver M'g Co., plaintiff in error, *vs.* Joseph Reynolds *et al.* Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 2d day of April, A. D. 1887. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. ——, attorney for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States, Washington, D. C., a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 27th day of May, A. D. 1887.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

45*a* *Citation, U. S. Supreme Court.*

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to Joseph Reynolds and John D. Morrissey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at —— on the second Monday of —— next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein The Iron Silver Mining Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 2nd day of April, in the year of our Lord one thousand eight hundred and eighty-seven. MOSES HALLETT, *Judge*.

[Endorsed:] Gen. No. 1524. Circuit court of the United States, district of Colorado. The Iron Silver M'g Co., plaintiff in error, *vs.*

Joseph Reynolds *et al.*, defendant- in error. Citation. Filed in circuit court of the U. S. this 2d day of April, A. D. 1887. Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. F. W. Owers, attorney for plaintiff in error.

DENVER, *April 2d*, 1887.

We hereby acknowledge service of copy of within citation this 2nd day of April, A. D. 1887.

PATTERSON & THOMAS,
Attorneys for D'f'd'ts, Reynolds & Morrisey.

45*b* And afterwards and on, to wit, the 26th day of April, A. D. 1887, came again the said plaintiff, by its attorneys aforesaid, and filed in said court and in said cause its bill of the exceptions reserved by it upon the trial of the issues herein.

And the said bill of exceptions is in words and figures as follows, to wit:

45*c* UNITED STATES OF AMERICA, *District of Colorado:*

In the circuit court of the United States for the district of Colorado, in the eighth judicial circuit, at the general term thereof, begun and holden in the city of Denver, in said district, on the first Tuesday of October, A. D. 1886.

Present: Honorable Moses Hallett, district judge, presiding.

THE IRON SILVER MINING COMPANY, Plaintiff,

vs.

JOSEPH REYNOLDS *et al.*, Defendants.

Be it remembered that on the trial of this cause, during the general term of this court, to wit, on the 22nd day of January, A. D. 1887, a jury having been duly empanelled and sworn, the plaintiff, to sustain the issues on its part, introduced in evidence as follows:

It first offered in evidence three location certificates of the Wells and Moyer placer, two made on the 23rd day of March, 1878, and the other for 193 acres, made on April the 11th, 1878.

The plaintiff then offered in evidence a certificate of the register of the land office of the date of the application for patent to the Wells and Moyer placer, being May the 16th, 1878, and of the date of entry of said claim, being the 22nd of July, 1878; which was admitted without objection.

46 Plaintiff then offered the following deed: A deed from Wells and Moyer to William H. Stevens and Levi Z. Leiter, dated October the 8th, 1878, conveying certain portions of the Wells and Moyer placer described in the complaint.

Which was admitted without objection.

The plaintiff then offered the patent from the United States to said Wells and Moyer, dated March the 11th, 1879, conveying to said Wells and Moyer the property described in the complaint.

Which was admitted without objection.

The patent conveys the territory described in the complaint, and contains the following grants and reservations:

"Now know ye that the United States of America, in consideration of the premises and in conformity with said Revised Statutes of the United States, having given and granted, and by these presents do give and grant, unto the said Thomas S. Wells and Wm. Moyer and to their heirs and assigns the said placer mining premises above described as lot No. 281, embracing a portion of the unsurveyed public domain; to have and to hold said mining premises, together with all the rights and privileges, immunities and appurtenances, of whatsoever nature *soever* thereunto belonging, unto the said Thomas S. Wells and Wm. Moyer and to their heirs and assigns forever, subject, nevertheless, to the following conditions and stipulations:

First. That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot No. 281, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits which may hereafter be discovered within said limits and which are not claimed or known to exist at the date
47 hereof.

Second. That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above-described premises at the date hereof the same is expressly excepted and excluded from these presents.

Third. That the premises hereby conveyed may be entered by the proprietors of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits for the purpose of extracting and removing the ore from such vein, lode, or deposit should the same or any party thereof be found to penetrate, intersect, pass through, or dip into the mining ground or premises hereby granted.

Fourth. That the premises hereby conveyed shall be held subject to any vested or accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Fifth. That, in the absence of necessary legislation by Congress, the Legislature of Colorado may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means, to the complete development thereof.

In testimony whereof I, Rutherford B. Hayes, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

48 Given under my hand, at the city of Washington, the eleventh day of March, in the year of our Lord one thousand

eight hundred and seventy-nine, and of the Independence of the United States the one hundred and third.

By the President—

R. B. HAYES,
By WM. H. CROOK, *Secretary.*

[Seal U. S. Gen'l Land Office.]

S. W. CLARK,
Recorder of the General Land Office."

Plaintiff next offered a deed from Stevens and Leiter to the Iron Silver Mining Company, dated March —, 1880, conveying various property, and among it that certain portion of the Wells and Moyer placer conveyed by Wells and Moyer to Stevens and Leiter and described in the complaint.

Which was admitted without objection.

Plaintiff then offered in evidence patent of the United States to the Rock and Dome Lode mining claims and deeds conveying the title conveyed by the patent to the Rock and Dome claims from the patentees to the Iron Silver Mining Company for the purpose of showing that the lode which, since the issuance of the Wells and Moyer placer patent, has been ascertained to dip into and extend within the boundaries of the Wells and Moyer patented placer has its top, apex, and outcrop within the Rock and Dome Lode mining claims and for the purpose of tracing the right to follow that vein or lode from its top, apex, or outcrop situated within the Rock and Dome Lode mining claims within the end lines of said lode mining
49 claims produced according to law into the territory in dispute in this action.

The same was objected to by defendants' counsel on the ground that there is no issue of the kind in the pleadings, which objection was sustained by the court; to which ruling of the court the plaintiff, by his counsel, then and there duly excepted.

FRANCIS T. FREELAND, a witness produced, sworn, and examined on behalf of the plaintiff, gave testimony tending to show—

That he is 27 years of age; that he is by profession a mining and mechanical engineer; that he is employed at Leadville in the employ of the Iron Silver Mining Company as superintendent and mining engineer; that he verified the map upon the wall marked Exhibit "A." It represents, as near as could be discovered by records and statements of others who are to be witnesses for plaintiff, the condition of Rock Hill in March, 1879. It shows the outline of the Wells and Moyer placer as patented. It shows the William Reddick, Oro La Plata, and H. D. Lode mining claims as located. They were not patented at that time—the Crown Point and Pinnacle Lode mining claims, as the early locations give them—and the dotted line shows the shape of the two claims after the amended locations in 1883. It also shows California gulch, Eureka gulch, and the various gold washings in California and Eureka gulches and on the slope of the hill, which are indicated by the dark shading. The ditches which traverse the hill are shown by solid blue lines; the

gulch bottoms by double blue lines. The discovery shafts of the Reddick, Stone, H. D., La Plata, Crown Point, Pinnacle, Dome, and the discovery cut on the rock is also shown; also a working
50 on the rock claim in the northeastern portion of the claim; also some workings on the Oro La Plata in the northern end or near the northern end of that claim. Those of the workings mentioned which contained mineral in March, 1879, are shown by the red mark or dot over them. The ground-colored solid brown represents the territory patented as the Wells and Moyer placer. The dark shading shows placer ground actually worked out lying partly within and partly without the Wells and Moyer placer. Leadville is situated about a mile and a half or two miles west of the placer.

(Witness is here shown a model, marked Exhibit "B," which he explained as follows:) This is a model or relief map showing the same features as the paper map, the claim lines, and so on, being painted upon a surface which represents the contour of the ground in that neighborhood and the topography of the hill. The scale of this model is 300 feet to the inch, the horizontal scale and the vertical scale being the same. By considering that one inch is equal to 300 feet you can determine the approximate elevation at any point with reference to any other point. The model is made from surveys made by myself and compared with the result of those surveys.

Plaintiff's counsel here offered the map and model in evidence, and the same were admitted without objection.

The said map is as follows, to wit: Exhibit "A."

(Here follows diagram marked p. 51).

52 Cross-examination by Mr. MORRISON:

The map only shows eight lode claims altogether contiguous to the placer. It doesn't show all the lode claims that touch the placer, there being other lode claims and placer claims around the territory shaded brown that are not laid down on the map. I know the Nisi Prius Lode claim. As that claim was located two corners of the claim lie upon the placer as patented. No portion of it conflicts with the placer.

Q. At the time of the location of the Wells and Moyer placer the Nisi Prius was a lode claim with boundaries running into the Wells and Moyer ground, wasn't it?

Objected to by plaintiff's counsel because immaterial to the issues in this case.

The COURT: They desire to show the locations around there for the purpose of showing whether there was knowledge or not. The question tends to prove whether there was knowledge or not.

Mr. WOLCOTT: Is your honor of the opinion unless it is connected with this lode that knowledge of other lodes that are not concerned with this case could in any way be brought to the jury's attention?

The COURT: Locations all around this placer. I think it is pertinent to the evidence.

To which ruling of the court in overruling said objection the plaintiff, by its counsel, then and there duly excepted.

WITNESS: The surface boundaries of the Nisi Prius did conflict with the placer, but the discovery of that claim was seven hundred feet south of the placer. The Pennsylvania Lode claim is one
53 of the southeastern boundaries of the placer, the discovery shaft being 150 feet or so east of the placer. My impression is that the Vermont lode was not located at this time (date of Wells and Moyer patent). It is now situated in this neighborhood (indicating), and wholly without the placer. The way the claim is now located it touches the placer.

Q. Where was the Gilt Edge?

A. The Gilt Edge is on the northwestern boundary of the placer.

Plaintiff's counsel object to any testimony touching any lodes or lode claims not existing, developed, and discovered prior to July, 1878, when the entry was made of the Wells and Moyer placer.

Mr. MORRISON: We propose to connect these lodes with the placer and to show that they were claimed at the time this Wells and Moyer patent issued.

The COURT: Very well.

Mr. OWERS: We understand the theory upon which this evidence is going in in regard to these lode claims is that they are not only lode claims, but that they were valid discoveries within the claims at this date (July, 1878), and that they intend to follow this proof up with something of that kind. The fact that there were mere claims there is nothing, and I take it that should not go into the evidence.

The COURT: I think he can show the claims that were staked. If he wishes to show after that they were discoveries he can do so, but he is at liberty to show that merely the locations were made of these properties.

To which ruling of the court the plaintiff, by his counsel, then and there duly excepted.

54 The Leadville Lode claim was located eight months after the issuance of the Wells and Moyer placer patent, having been located in November, 1879. It is now located within the Wells and Moyer placer as patented. The A. Y. claim does not touch the placer, but lies north of the Stone and William Reddick, being about 200 feet from the placer. So far as I know or can ascertain, the Wells and Moyer placer never took in any portion of the A. Y. The Gnesen lies in this neighborhood (indicating within the placer). I don't know the Black Tail, Gonabrod, or the Summit Lode locations. I came to Leadville from Philadelphia in July, 1881. I don't get my information from hearsay, but from certified copies of location certificates and the patents of the various claims I have mentioned. The workings shown on the map as having been made in March, 1879, will be verified by witnesses who will testify to making them. I don't know of the Leviathan. I know the Minnie; it lies northwesterly of the placer and comes within 200 feet

of the edge of it. I don't know the Thomas Francis Meagher and the Gray Eagle. I do know the Rebel Minnie; it lies about a mile or so north of the placer. I have put down on that map, generally speaking, all lodes supposed to be on the ground in March, 1879. There is a large amount of white paper that I haven't filled up with lode claims, thinking they had no bearing on the matter. Georgia gulch extends across the placer, as marked on that map. It is a true gulch, with water running in it at certain seasons of the year. The dark shading on the map represents the amount of ground that has been worked out for gold; its greatest width is about 450 feet. The scale of the map is 100 feet to the inch. The Wells and Moyer placer includes about 2,050 feet of California gulch bottom.

55 Q. Now about how many acres of actual placer workings have you made out to be in the inside of the lines of that placer? In the first place give the jury the number of acres in that placer.

Mr. WOLCOTT: We will interpose a further objection, that they cannot inquire into the character of this ground, whether it is placer or otherwise, after it is covered by the issuance of a patent by the Government.

But the court overruled the said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. The amount of ground patented as the Wells and Moyer placer is 193 acres and a fraction. There appears to be about ten acres of it which has been actually exhausted, worked as placer ground and worked out. Work has been done looking for gold as far as 800 feet on the placer from the center of California gulch. There is a large quantity of wash all over that placer. I have seen what I should call pay gravel all over Rock Hill. The ditches shown on the map across the claim are in existence there. They are in working order except this portion from here to here (indicating), and with that exception were carrying water in the fall. The average elevation of the placer above California gulch is between 100 and 200 feet. The highest point above the gulch is 600 feet.

Redirect examination:

The Wells and Moyer placer is practically surrounded by other placers—the Graham placer, the Montgomery, the Moyer, the Wells and Alexander, the Pease, the McKenzie, and the Curley
56 placer, adjoining the Wells and Moyer, and the Oscar, a little further west. There is no part of the Wells and Moyer placer which is over 2,500 feet from some gulch. Iowa gulch lies immediately south of this placer. Georgia gulch runs through the center of it and California gulch on the north. Judging from the workings on the ground, pay gravel has been found 2,500 feet or so from California gulch, and at other points they find pay gravel six or seven hundred feet from California gulch. Georgia gulch is extensively worked for gold purposes a little further west than this placer.

Recross-examination by Mr. MORRISON:

When I say that Wells and Moyer placer is practically surrounded by placers I mean that of the different lines which form the boundaries of the placer the greater majority of those lines in length are boundaries of other placer claims than they are of lode claims.

Q. You don't mean that they touch upon actual placers, worked as such, do you?

Objected to by plaintiff's counsel because if patents issued for those claims that is conclusive that the ground was placer; which objection was overruled by the court; to which ruling of the court in overruling said objection the plaintiff, by its counsel, then and there duly excepted.

A. I mean that the Wells and Moyer placer touches other actual placer ground, and that that ground has been worked by miners in the expectation of finding gold. The ground along here (indicating to the northeast) is patented as the William Moyer placer,
57 and has been worked for gold. The Wells and Alexander placer, to the east, has also been worked; the Pease placer, to the south, was worked last summer, and the lower end of the Curley placer, to the west, has been worked. There is placer ground in White's gulch, shown by the shading, which has been worked within a hundred feet of the placer, and in this neighborhood, too (indicating to the east); but your hundred-foot limit practically cuts out these other placers, the workings on which are two or three hundred feet away. I have pointed out several places which show what you call placer workings within a hundred feet of the boundaries of the Wells and Moyer. The placer workings on Georgia gulch are all to the west, below the placer. The Moyer placer lies to the north along Nugget gulch. The same Moyer who owned in the Wells and Moyer located the Moyer. The only other placer belonging to the Iron Silver Mining Company that I have mentioned is the Moyer.

L. S. NOBLE, a witness produced, sworn, and examined on the part of the plaintiff, testified as follows:

I am a mining engineer: twenty-two years of age; was educated at the School of Mines, Columbia College, New York; am at present a surveyor in the employ of the plaintiff. This is a photograph showing the greater part of the Wells and Moyer placer claim; it was taken by me from a point near the southerly end of the H. D. claim, looking west down Georgia gulch; there are three copies of this photograph.

Plaintiff offered a copy of the photograph identified by
58 the witness in evidence, which was admitted without objection and marked Exhibit "C."

Cross-examination by Mr. MORRISON:

The photograph was taken two weeks ago; the depression in the center shows Georgia gulch, but not very plainly, for it was a cloudy day and the snow was on the ground.

Exhibit "C" is as follows, to wit:

(Here follows photograph marked p. 59.)

60 S. S. ROBINSON, a witness produced, sworn, and examined on the part of the plaintiff, gave testimony tending to show:

Have been a miner for thirty years and at present the general manager of the Iron Silver Mining Company, the plaintiff; first became acquainted with the Wells and Moyer placer in August, 1878, while prospecting; recognize the map and model (Exhibits A and B) as correctly showing what they purport to represent; became manager for Stevens and Leiter some time in the fall of 1878, and as such became very familiar with the properties shown on the map; the workings shown on the map (Exhibit A) are all the workings that existed upon the territory shown by the map at that time.

Cross-examination by Mr. MORRISON:

Was manager from the fall of 1878 until the end of 1879; last May I came back again and took general charge of the property and have been in charge since. The only lode which outcrops on the south side of California gulch is that which outcrops on the Rock and Dome Lode mining claims; in March, 1879, the only outcrop shown upon the territory represented by the map was for two hundred feet on the Rock Lode mining claim where it was eroded; have been a witness before in relation to the Iron Mining Company's property.

And thereupon plaintiff rested its case in chief.

61 And thereupon the defendants, to maintain the issues herein on their behalf, gave in evidence as follows—that is to say:

WILLIAM B. PAGE, a witness produced and sworn on the part of defendants, gave testimony tending to show:

I am an engineer; have lived in Leadville since 1878; was educated in the Virginia Military Institute; have examined nearly all the principal mines in Lake county; know the parties to this action; I am engineer for the defendants; maps shown on the board were made under my supervision in my office. This model and map are made on the same scale with the same colors, the difference being the claims are in white on the model and black on the map, because one is a dark ground and the other white. The territory surrounded by blue lines with the Wells and Moyer placer show territory for which wells and Moyer gave bonds for deeds or else have deeded to others than the plaintiff in this action. There is a portion of the Pennsylvania conflicting with the placer, the Gnesen, the Leadville, and the Nisi Prius. California gulch is on the north of the placer.

Eureka gulch is a dry gulch east of placer which empties into California gulch. The whole of Rock Hill slopes generally to the west. The Crown Point, Pinnacle, Ora La Plata, Stone, A. Y., Minnie, Gilt Edge, are shown upon the map. From the southeasterly corner of A. Y. and Minnie, anywheres upon the placer, is about a hundred feet. The scale of the map and model are one hundred feet to the inch.

Plaintiff here objected to any evidence as to workings and developments tending to prove the existence of a vein within the
62 boundaries of the Wells and Moyer placer, unless it be shown that the workings or developments were made prior to the date of the issuance of the patent for the placer, to wit, March the 11th, 1879; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

This is a plain map, on the scale of twenty feet to the inch, showing the workings of the Crown Point and Pinnacle Lode claims. That shaft on the Pinnacle reaches the vein at the depth of about 108 feet from the surface. That is the discovery of the Pinnacle. The location certificate of the Pinnacle claims a discovery some time in 1877. The workings extend in the discovery shaft through the Crown Point and Pinnacle. These workings disclose a well-defined vein dipping easterly at about 15 degrees, having a hanging wall of porphyry and a foot wall of lime. The hill rises to the east and the vein dips to the east, so that it gradually gets deeper below the surface. The vein varies in thickness, and is shown on this map to extend from the outcrop down to a point where the plaintiffs claim the trespass was committed. This map was used at a former trial and is the same as was shown then. Since then additional work has been done in the Crown Point, but they all show the same thing, that the vein has an extension latterally as well as on its dip and extends entirely through the Crown Point and Pinnacle claims. The line between the Pinnacle and the Wells and Moyer placer is marked *a b*. Through all the workings, as shown on this map, you can trace this body of mineral continuously of a well-defined vein varying in thickness, as I said; first examined the discovery
63 shaft of the Pinnacle in 1883; first made examination of Crown Point and Pinnacle claim in 1879 or 1880, but didn't then go down discovery shaft; examined at that time the shaft numbered three and the level going from it, which we see here is very close to the La Plata line. The question was whether these stopes had reached the La Plata line, which is that green line. I think this is the discovery shaft of the Crown Point. Some ruling of the Land Office, on the application for patent, cut this portion of the Pinnacle off, and they sunk a shaft there in the center of the claim; that shaft is not very deep. The workings of the Crown Point and Pinnacle, in connection with this suit, were driven to a very small extent across the line, with the vein as placed there coming down very vertically. You couldn't ascertain without very close surveys on it whether it was on one side or the other. A close

survey showed that they had gone over a very slight extent at the claimed point of trespass; a distance vertically from the vein to the surface is 335 feet. The vein at that point is part of the same lode or vein that has been followed all through the Crown Point and Pinnacle. The model is a model of the hill, showing the whole of the Wells and Moyer placer, made from instrument work on the ground, with reference to lode claims. The topographical features of the model and map are also made from surveys. The difference in elevation is shown on the map on a proper scale, the horizontal and vertical scales being 100 feet to the inch. This model is made on a larger scale than that of plaintiff's. I know the model to be substantially correct, having checked the surveys and having had the model made under my supervision. The model represents the same ground as the map. The model is cut through so as to show the vein underlying, the section being chosen
64 where the deepest workings exist. The model is cut through westerly and easterly and the Sequin shaft taken as a point, as it is one of the deepest shafts on the hill; thence through the Crown Point shaft and the Moyer shaft, which is furthest east and deepest. The model is cut in an additional section (opens model). Going under the surface of the model, the wash is shown in dark color, averaging about 200 feet in depth over the entire placer, and porphyry is shown in yellow; the vein is shown in red underneath the porphyry and on top of the blue limestone, which is colored blue. White limestone is known to be under the blue limestone, and the quartzite under that, and the granite under that. This section through the model shows the workings of the Crown Point and Pinnacle, which corresponds very nearly to that section (referring to map). This section is taken in a little different place. It shows where the mineral reaches the wash at that point, which is the upper end of that map. The vein has a general eastern direction. The Sequin shaft, as shown by the model, is down 400 feet and reaches this vein and shows this fault; a fault is the breaking or dislocation of the rocks. The limestone was once horizontal; it is now tilted to an angle of fifteen degrees and broken in that way, and there is a dislocation on one side and a dropping on the other of six hundred feet. The lime and the vein outcrop at this point (indicating). The Sequin shaft at its depth not only shows how much those rocks have fallen, but shows what rock is next under the blue limestone, being white limestone and quartzite under that, and then comes the granite. The Moyer shaft is shown on the model, not on the Wells and Moyer placer, but on the William Moyer placer. It was sunk by the Iron
65 Silver Mining Company about four hundred feet deep. The next deeper working to the east is the Leo shaft; it has reached the limestone, cutting through the porphyry about 550 feet; it is quite a recent working.

The COURT: What is the object of this description?

Mr. THOMAS: The object is to show the surrounding workings. The probabilities are that a vein generally existed at the time this claim was located. I will make it as short as possible.

PLAINTIFF'S COUNSEL: We understood you were trying to prove

the right to follow the vein from the apex. We object to this evidence and to any evidence as to workings and developments not upon and within the boundaries of the Wells and Moyer placer, and as being immaterial and irrelevant; which objection was overruled by the court; to which ruling of the court the plaintiff, by his counsel, then and there duly excepted.

The Vermont shaft has not reached the limestone. The vein from here to here (indicating a southeasterly direction from the Crown Point and Pinnacle workings) is problematical and is not shown by the Vermont shaft. The vein is shown on the model as pervading the whole country underneath the porphyry, because it is shown to exist there from the various workings on that hill and because the mineral ores in that section are generally found in that position. The vein is a carbonate deposit or oxidized ore recumbent on the limestone and between the limestone and the porphyry.

Q. Mr. Page, have you made any test or examination of the surface or what lies beneath the surface of the Wells and Moyer placer in shafts that have been sunk upon it for the purpose of de-
66 termining how much is auriferous gravel?

Objected to by plaintiff's counsel for the reason that the patent is conclusive as to the character of the ground, and for the reason that under the statutory definition of a placer the territory need not necessarily contain any auriferous gravel to constitute it a placer within such definition: which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there only excepted.

A. The shafts sunk all over the hill show the character of the ground. There are 193 acres in the Wells and Moyer placer, and I should say that $\frac{1}{20}$ of that amount in the bed of California gulch and around the bed of Nugget gulch shows that it is placer ground. As you travel up the hill there is no longer any placer dirt there to any extent. There is wash there, as shown on that model, to the depth as represented there, where it is developed, but there is no placer gravel in any sense of the word. The wash consists of sharp, angular fragments of rock on the surface, and the rocks and boulders in the gulch are smooth round boulders and have no sharp, angular faces. I recall no placer workings except those in California gulch and at the head of Nugget gulch and some on the other side, in Iowa gulch, not reaching up to the placers. I have not seen the ditches shown on Mr. Freeland's map, except one coming over across the placer from Iowa gulch and emptying its water in California gulch. I have examined the Leadville and Nisi Prius claims, and the same lode — which we have been speaking, between the porphyry and lime, is disclosed in both of them and is easily discernible from other workings which, I think, are near
67 the upper edge or outcrop of the vein; the workings on the H. D. and the William Reddick show the same vein. One hundred feet of tunneling was done on those claims before I reached the camp; have been through the Minnie and A. Y.; the old workings and the auriferous gravel beds still existing there are found in

Eureka gulch and in California gulch. From the bed of California gulch to the summit of the hill is about 400 feet; from the point where the William Moyer placer joins the Wells and Moyer on the northeast to the highest portion of the hill I should say the elevation is about 250 feet. According to the location certificate of the Summit lode claim, it lies just alongside of the Sequin. I was with the photographer when these photographs were taken; one was taken from the Lime Lode mining claim, looking south towards the placer; another is taken from the Colonel Sellers mine, looking towards the Wells and Moyer; the one marked "3" was taken from the Imes Lode claim, situated on the north side of California gulch, and the view is looking south; this shows the summit of the Wells and Moyer placer and the houses and dumps of the La Plata workings and the Crown Point workings; number four was taken from the south side of Iowa gulch, looking to the north, showing the south side of the placer—towards Iowa gulch.

Cross-examination by Mr. WOLCOTT:

Came to Leadville in the fall of 1878; had already had some experience in mining, having seen the gold mines of North Carolina and the lead mines of Kentucky, but had seen nothing of the Western mines; I simply examined the mines mentioned; my first experience, if you call it that, was in Leadville; I first went upon Rock Hill and upon this placer in 1880; all I can recall as
68 to the developments on Rock Hill, in 1879, were certain excavations on the Rock and Dome Lode mining claims, and I haven't a very plain recollection as to those. I don't know whether mineral was disclosed in them or not. I knew the trend or course and dip of the lode in the Rock and Dome at that time, from my knowledge of the iron mine, which is north of this hill. From the general lay of that country I knew that these discoveries were on the strike of a lode running north and south, and that the general direction of that lode was to the eastward, dipping into the hill. I don't recall that there was any mineral in the Rock and Dome in 1879. There was no discovery there to indicate anything, to my knowledge, at that time. I examined the Lime claim, the Bull's Eye, and Silver Wave, to the north of there, in 1879, but I don't recall any mineral except upon the Lime. There was a large heap of mineral taken from a little below the incline on the Lime. The Lime claim is north of California gulch, and the gulch lies between it and the Rock and Dome. Passing from the Lime to the Rock and Dome you would descend four or five hundred feet into the bed of California gulch and then make about the same ascent to the Rock and Dome. The Lime is two thousand feet away from the Rock and Dome. I had not seen the openings in the Rock and Dome in March, 1879, and didn't know then there was a legal discovery in them. I didn't know that there was a lode dipping to the east from the Rock and Dome until after I was in the openings. All I knew in March, 1879, was all hearsay about this ground. The Leadville lode was located subsequent to the entry of the Wells and Moyer placer, I think. I put it on the map, because the shaft

has now gotten down to mineral and shows the vein of which I am speaking. I first realized that there was a deposit
69 of mineral in the Leadville in 1882, long after the Wells and Moyer was patented. Everything I speak of before 1879 is hearsay and from the records of location certificates. The top, apex, or outcrop of the vein which crosses the southwest corner of the Crown Point is 108 feet from the surface. There is no outcrop of this vein upon the surface, and the vein does not come through the wash; there is a hundred feet of wash over the outcrop. No man going over the surface of the ground on the Crown Point and Pinnacle could, without development, have any information that there was any lode beneath it. I draw here in the rough, so the jury can see it, the top or apex of that lode, which exists 108 feet beneath the surface. It is here on the model and I trace it all around (indicating from the southwest corner of the Crown Point the length of about 20 feet on the Crown Point, passing thence onto Dome in a northwesterly direction, thence onto the rock, and thence around Stone mining claim). There is a tunnel 175 feet long runs right in fault from the Sequin shaft; it shows the direction of the fault to be directly south. The Sequin shaft reaches the fault at 500 feet deep. The fault is not shown on the surface. The vein or lode which has its outcrop as indicated is not the same vein or lode as shown in the Sequin shaft, but that is another vein or lode. It depends upon the extent of the fault as to whether it is the same vein or lode. If the fault were only a few feet and would carry ore from the upper to the lower part, I should say that was not a sufficient break to constitute two distinct veins, but if there were a great fault, I should say very great, they could be very well called two distinct veins, one occupying one horizon and the other another. In these veins, before I can ascertain whether I
70 am on the same vein or lode I must ascertain whether a fault exists and its extent before deciding. If there were a number of faults through this ground, say two hundred of them, and they were large enough in extent, there would be two hundred veins. The model is made from the developments of all the shafts around the placer. I think the only vein we know of in the placer is the one between the blue limestone and the porphyry, with the exception of the Pennsylvania. The Pennsylvania reaches the vein here in a shaft close to the placer at the shallow depth of about fifty to one hundred feet. The limestone outcrops there. I have shown the porphyry to exist in the Pennsylvania in the model, because there is not sufficient development to show the extent of the Pennsylvania vein. The vein in the Pennsylvania is dipping to the south. It should come out where I have shown porphyry in the model. I have not put it there, because I didn't know that it came out. The vein may come through there. The model is not correct in that it does not show the Pennsylvania vein. The vein I speak of in the Pennsylvania is well defined. I think there are two veins in the Pennsylvania, and I think by sinking deeper in the Pennsylvania they will reach this vein (referring to vein in Rock and Dome, Crown Point, and Pinnacle). The vein on the Pennsylvania

would come out some two hundred feet below the surface. The vein in the Pennsylvania is not of sufficient extent to put it on the model. I have never been down the Vermont. It is 650 feet deep, so I am informed. I have never tried to go down the Vermont, but have shown the shaft as being sunk through wash and porphyry in the model. The work shown on the map shows the work done in the Crown Point and Pinnacle claims up to November, 1884.

71 There has been a great deal of work done since then. I have that additional work shown upon other maps.

Q. Well, let us see them.

Objected to by defendants' counsel.

Mr. WOLCOTT: I desire to show that these workings are not on the dip of the lode at all; that the defendants have subsequently drifted around the Oro La Plata, and that they are now working up the hill to an entirely different property and upon an entirely different lode.

The COURT: That does not matter. The only question is whether there is a lode there and whether your grantors knew of it at the time this placer was located.

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

—. The workings on the Crown Point and Pinnacle in 1880 showed a small circuit around a working shaft; that is shaft number three, and was all the working that was done at the time I first went there. In my opinion, there is but one lode extending under the Wells and Moyer, and that the top or apex of it extends around in this way (indicating across Crown Point, Rock and Dome, and Stone claims and in a northerly direction).

Q. Then any vein found here between this same formation or here (indicating under Wells and Moyer placer) would all be the property of the people who had the top or apex of that lode?

Objected to by defendants' counsel; which objection was sustained by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

My idea is wherever you went under the placer you would

72 be upon one lode, the top or apex of which is located as indicated. I think that that lode extends from that top or apex and outcrop eastward under the whole of the placer, but it does not extend under the next placer, because there is a fault shown by development to the northward of the Mike and Starr, which, I believe cuts off the vein to the eastward or just east of the Wells and Moyer placer. I think the lode, the apex of which I have indicated, ends at that fault. That fault is shown three-quarters of a mile from the Wells and Moyer placer. The fault is not developed, but I think it extends on through close to the Leo shaft, and also very close onto the Vermont shaft just east of the placer.

Q. Let us have some more faults.

The COURT: It is not necessary to spend time. It is perfectly immaterial whether they exist or not as to this controversy.

Mr. WOLCOTT: Only if the jury should find that these faults really existed it might affect their consideration as to whether or not this was a lode or not.

Mr. OWERS: There is another consideration. This witness has testified that this vein extends clear under Iron Hill, Rock Hill, and all around the country, cut off in north and south directions by faults. As a matter of fact, there are east and west faults, and there are dykes east and west which divide the vein and cut it up according to his definition into several veins, and it is a question as to which one of these veins they claim to have existed at the date of the application for patent to the Wells and Moyer placer. They can't claim it was all one vein if these dykes and faults existed.

73 He cannot be heard to say that the Iron vein on Iron Hill is the same as that on Rock Hill when he knows, and his evidence will show, that there is a fault running parallel to California gulch, and also a dyke running in a northeasterly and southwesterly direction across California gulch, which certainly divides that vein into two pieces. He has testified that a fault of six hundred feet may divide a vein if it runs north and south. Why may not the same thing divide a vein if it runs east and west?

The COURT: I don't care for a discussion of the subject. The faults have nothing in the world to do with it.

To which ruling of the court the plaintiff by its counsel then and there duly excepted.

Redirect examination by Mr. THOMAS:

Stevens and Leiter located the Iron, Bull's Eye, Lime, Stone, Rock, and Dome, now the properties of the Iron Silver Mining Company, the plaintiff in this suit. When I say the Leadville was located subsequent to the entry of the Wells and Moyer placer claim I speak from records. There are no developments showing that there are two hundred breaks or two hundred veins within this placer. The La Plata is worked generally for the entire length of 1,500 feet. I knew there was a known lode there. I simply have a general recollection of Rock and Iron Hill about the year 1879 or 1880. I saw the Iron, the Bull's Eye, the Lime, the Stone, the Rock, and the Dome were all located on the outcrop and strike of the vein. I knew there was a lode there. The La Plata was my earliest

74 recollection there; it was the first claim I was in; that was said to have been located in 1873. It was the first claim located on the dip of this vein which gave me an additional knowledge of the vein.

Recross-examination by Mr. WOLCOTT:

I think I was in the La Plata in 1879. It was the first claim I was in after I got to Leadville.

ELMER DUTRO, a witness produced, called and sworn on the part of the defendants, gave testimony tending to show:

Have lived in Lake county, Colorado, since May, 1876; have been mining during that time; knew Moyer, Wells, and William H. Stevens. Met them in Lake county; have been engaged in lode mining, and have done very little placer mining; have known the Wells and Moyer placer since March, 1878; knew the H. D. Lode claim since the spring of 1877, and was one of the owners. When I purchased it there was a shaft 80 feet deep.

Plaintiff's counsel here objected to testimony with reference to the H. D. claim, as it is situated outside of the placer, and evidence regarding it is consequently immaterial and irrelevant; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The H. D. claim is located on the west of the placer. In
75 1878 the bottom of the shaft showed iron and carbonate in place carrying silver. There was porphyry over it. I think there was lime under it. There was some water in the bottom of the shaft; haven't been to the claim since I examined it and bought in; at that time the mineral seemed to dip to the east about 15 or 20 degrees from the horizontal. I sold my interest to William H. Stevens; had conversation with him in Leadville.

Plaintiff's counsel objected to conversations with Mr. Stevens relative to the H. D. lode, for it is not on the placer and not within the placer boundaries and — nothing to do with it; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The conversation was about his purchase of the H. D. We went down to make the bargain for the sale. He said he would buy this claim on the proviso that we wouldn't prospect any more above the H. D.; wouldn't make any more locations above the H. D.—that is, east of it. He wanted me to sign and swear to an article of that kind, because he said he owned that ground up there and he didn't want to get into any more conflicts; he didn't want any more trouble with anybody. He said he thought his mineral ran up under there from the Stone and Rock. Survey of the Wells and Moyer was made between the 10th and 20th of March, 1878, by Mr. Henry D. Bates. I assisted him in chaining. I think I sold the H. D. to Stevens some time in February, 1878. I knew Moyer, and talked with him about the Wells and Moyer placer.

Plaintiff's counsel object to any conversation had with
76 Moyer, because immaterial and irrelevant; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

During that conversation I asked Mr. Moyer what he was taking up the top of that hill for and he said he thought there was mineral under that ground and he wanted it for the timber, too. There was a good deal of timber on the ground at that time, and he said he could

hold the mineral as well with a placer patent as he could with a lode patent. I told him I would charge him five dollars a day for chaining and he said he didn't care, it came out of Stevens pocket anyhow. I made that charge because the snow was deep and it was hard work wading through it. At the time Stevens purchased the H. D. he said the mineral dipped from the stone into the H. D. I first knew of the Crown Point and Pinnacle in the spring of 1878 and the La Plata in 1877. I saw the mineral on the La Plata dump in the spring of 1877. It was carbonates and the same kind of mineral as we found in the H. D. At the time I bought into the H. D. I examined the William Reddick. There was a shaft 60 or 70 feet showing sand carbonates under the porphyry, with lime underlying the carbonates; disclosed a vein dipping 15 degrees to the east. Have no interest in this controversy. That part of the Wells and Moyer placer lying close to California gulch had been worked for placer purposes up to the spring of 1878; first knew the Pennsylvania claim in the fall of 1877; was first down the shaft in 1883. The dumps of the Pennsylvania showed ore in the fall of 1877. When I was chaining the lines of the Wells and Moyer placer I told Moyer we were running on the Pennsylvania claim,
and he said he knew he was and he was going to give
77 Mr. Thompson a bond for a deed. After we went back to the
cabin I asked him what he was taking that hill in for and he said he was taking it in with a placer claim, and I told him I didn't think there was any gold up there, and he said he could embrace more territory with a placer, and he thought he could hold the mineral, if there was any under there, as well as he could with a lode claim. Mr. Stevens spent most of the time from 1876 to 1879 in the court and so did Moyer.

Cross-examination by Mr. WOLCOTT:

Was a coal miner in Missouri. I don't know much about placer mining. At the time Mr. Stevens bought mineral had been disclosed in the Stone lode eight or ten feet from the surface, dipping to the east. I should judge that the H. D. lode and the Stone lode were the same, and that the outcrop was on the Stone. Stevens claimed there would be a conflict between us, because he owned the top of the vein. In surveying the placer we left out the H. D. lode and nearly all of the Pennsylvania. At the time I did the chaining on the survey of the Wells and Moyer placer there were no other known lodes in this placer except the Pennsylvania taken in. All the mineral that was disclosed when I made the survey was on the Stone and on the William Reddick and H. D. and in the Pennsylvania and in the Oro La Plata. I didn't know of any mineral being disclosed in the Crown Point and Pinnacle at that time. I think I saw mineral on the Pinnacle dump. There was mineral in the H. D. When we made the survey we didn't take in the Pennsylvania shaft. I am familiar with Georgia gulch. It is not shown on Mr. Page's model

78 JOHN DEVLIN, a witness produced, sworn, and examined on the part of the defendants, testified as follows:

Have been a miner for twelve years; have lived in Lake county for ten years; know the Wells and Moyer placer; know the H. D. shaft was sunk upon it in the winter of 1877; never saw anything in the way of mineral on the dump of the H. D.; worked on the Stone for Stevens and Wood in January, 1877. The workings on the Stone, consisting of tunnels, drifts, and slopes, disclosed carbonate ore lying flat, or nearly so. Shipments had been made from it. The Reddick also showed carbonate ore, in the spring of 1877, the same character as the Stone. There were two shafts sunk on the William Reddick—one 300 feet from the other. We calculated in the second shaft to strike the same vein we had in the first. We got down to what I call contact in the second shaft. The La Plata disclosed ore in the spring of 1877; knew the Slipper claim. The ore disclosed there was broken up; hard carbonate. They called it carbonate ore in the Rock, Dome, and those mines. From the workings that existed on the lode claims mentioned I have not been able to say what the pitch or dip of the limestone formation is. All I know about it — is a lime quarry, where the limestone comes to the surface and the dip of that limestone is to the southeast; further than that I do not know. I should think it dipped 25 feet in a mile, or more. I first knew the Crown Point and Pinnacle in 1877; worked on the Pinnacle in 1878; sunk a shaft about 80 feet; first knew the Leadville somewhere in 1878 or 1879; saw limestone on the dump; knew the Nisi Prius in 1882; have known the Pennsylvania for about ten years; the dumps showed boulders, lime and some carbonates; the A. Y. showed ore prior to March, 1879.

79 I couldn't tell from the workings the dip of it; have known the A. Y. for about 10 years. I didn't know any claim within the boundaries of the Wells and Moyer placer that were not cut out except the Five Twenty. It was located as a lode claim on the northeastern end or corner of the placer. It runs north and south. The Wells and Moyer ditch was on the placer when I first came to that part of the country in 1877. I first knew of the ditch running towards the Dome mine in 1886—about September; knew William H. Stevens since May, 1877; had a conversation with him about the formation of the country in 1878.

Plaintiff's counsel object to conversations had with Stevens on the ground of immateriality and irrelevancy; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

We were speaking about the country in general. He was talking about the general formation of the country and of the prospects. He said he believed the time would come that whole country would be worked for carbonate ores, and that he had the outcrop of that vein, and that he was entitled to follow it as far as it extended east. He gave the opinion that it did extend east. He said he believed if there was a shaft sunk in Oro it would strike that vein. He was

talking to me about the iron mine. There is a big placer bar in there, probably two or three hundred feet wide. In 1878 the hill was thickly timbered. By wash I mean the same thing as gravel.

Cross-examination.

80 Never saw any ore on the surface of the H. D.: was in and about the shaft-house, and had there been any ore should have seen it. When I was first in the Pennsylvania shaft in 1882 it was then forty feet deep. There was ore in it but they hadn't got to contact; ore was just scattered. They were still in wash. There was some galena ore amongst the boulders. That would be my idea of the existence of a lode there. I would locate on that. I prospected for Wood and Stevens on the ground that was afterwards taken up as the Wells and Moyer placer. I didn't find any ore. There is no outcrop above the surface on any portion of the Wells and Moyer placer, to my knowledge. I should know it if it were above the surface. I know Georgia gulch. The formation through which it runs is gravel. It has been worked for placer purposes at its mouth. Georgia gulch is shown on the photograph numbered three, introduced by defendants, running the length of the photograph. I can't identify it. Mr. Stevens said he had the outcrop, top, or apex, and that by reason of his locations he could follow the vein on the dip and take this whole country. That was his idea.

Redirect examination.

The placer workings in Georgia gulch are situated about a mile from the lower end of the Wells and Moyer placer. Carbonate ores are generally found by sinking straight shafts between limestone and porphyry.

81 ADOLPH DONATH, a witness produced and sworn on the part of the defendants, gave testimony tending to show:

Lived in Lake county from June, 1873, until December, 1879; was a miner; now farming in Larimer county; have known William Moyer since 1873; know Thomas S. Wells and William H. Stevens; owned in the H. D.; never went into the shaft; sold my interest to William H. Stevens. When I sold Stevens said, "Boys, I bought this claim of you with the understanding that you don't prospect to the east of the claim any more; I am tired of fighting with you all the time." He said he had the outcrop and he claimed all the mineral there was there. I owned an interest in the Reddick, and sold to Stevens and Wood, in May, 1877; there was but one shaft sunk when I owned in it. The vein disclosed pitched to the east, at about fifteen to 20 degrees; we sunk a second shaft about 300 feet east; Mr. Stevens was in the first shaft.

Q. Did Mr. Stevens say anything to you about what he saw there?

Objected to by plaintiff's counsel because immaterial; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. He said, "Boys, you have a big body of mineral in here, but it all belongs to me." This was in the beginning of May, 1877; had carbonate ore in the La Plata in 1877; first heard of the Pinnacle in 1878. When Moyer worked as placer miner he was working west of me in the gulch; his workings extended perhaps a hundred feet on each side of the gulch.

Q. How much of that claim contains wash gravel, if you know, or placer gravel?

82 Objected to by plaintiff's counsel because immaterial and irrelevant, as it cannot be inquired into after patent is issued, and because pay gravel is not the only character of ground which constitutes a placer within the definition given by section 2329 of the Revised Statutes; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. Just a strip around Eureka and California gulches. Carbonate ores in this section of the country are generally found between limestone and porphyry or limestone and quartzite, dipping east; the dip is different in different lode. I should think it would average about twenty degrees. Had a conversation with Moyer in the spring of 1878.

Plaintiff's counsel object to conversation with Moyer as immaterial and irrelevant; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

—. I met Moyer on the road and he said: I am going to make a survey of placer ground, taking in all this territory, and he says: I know you have three claims in Eureka gulch, and I will take them in and give you a bond for a deed, and after the patent is granted I will give you a warranty deed for it, and your claims will be safe and you need not work any more. I said: What are you taking that ground up for placer, you know it is worthless for placer? and he said: You know it ain't for myself; it is for Stevens, and you also know Stevens can't take the patent for the ground and I take
83 it up for him.

Cross-examination by Mr. WOLCOTT:

The three claims Moyer named were gulch claims of mine—placer claims. I don't know whether it is all one lode under this whole country or not. Mr. Stevens told me he claimed the mineral in the Reddick because he had the outcrop in the Stone location. I don't know how the vein in the H. D. pitched; couldn't tell from the workings in the Stone how that vein pitched. The Reddick pitched to the east. The workings of the Reddick were not connected with the Stone or the Pinnacle or the La Plata in 1878 or 1879; was last in the Pennsylvania shaft in 1878; shaft didn't at that time show a defined vein; it showed good indications of a lode; the mineral was not in place; it was broken up. I wouldn't call it a vein of ore in rock in place; had no idea in 1878 what the forma-

tion of the ground between the Stone and Pennsylvania was. I couldn't tell it and I don't know how anybody else could; a good many claim they can; think the placer ground is only fifty feet back from California gulch, but I have claimed ground further back than this fifty feet as placer ground. The ground was taken up three hundred feet from Eureka gulch as placer ground; I bought ground there as placer ground.

CHARLES A. YORK, a witness produced, sworn, and examined on the part of the defendants, gave testimony tending to show:

Was in Lake county in the spring of 1878; knew the
84 Wells and Moyer placer; located a claim there in 1878 called the Magnitude; it was on what is called the Wells and Moyer placer; we sunk a shaft 120 feet and found float ore; took up another claim east of the Magnitude, called the Leadville, about the first of September, 1878; had a conversation with Mr. Thomas S. Wells about the Leadville claim in the year 1878, in the fall. I went to him after he made application for a patent to the Wells and Moyer placer and asked him for a bond and he gave it to me; he seemed a little reluctant to do so, but finally did so. I told him that we had located and done the work on the Magnitude and we found we were too low—at least, we thought we were—and we went up the hill, further east, and located the Leadville; that at the time we located the Leadville claim we had done a few feet of work——

Q. Are you now reciting your conversation with Mr. Wells?

A. Yes, sir.

Objected to by plaintiff's counsel because incompetent.

The COURT: It is entirely competent, sir.

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

We suspended work about a month, and then I went to Mr. Wells and got this bond for a deed before we resumed work, and then we resumed work and worked continuously over a year on the Leadville claim. I couldn't say positively when we reached the vein in the Leadville; it was before March, 1879, and it was a vein between lime and porphyry, dipping to the east. I sold out to George E. Pease, one of our partners. I discovered an outcrop of a vein on the Nisi Prius in the spring of 1878 about here (indicating off the
placer). The vein is between lime and porphyry. I couldn't
85 tell from the outcrop which way it dipped; saw ore in the Pinnacle in 1878 dipping to the east; saw ore in the Rock in the summer of 1878; it was in a vein between lime and porphyry and shown in a tunnel. I don't know that either Mr. Wells or Mr. Stevens were in the Leadville shaft after we struck mineral. My experience as a placer miner has not been great; all the shafts sunk on the placer show wash, sand, and gravel; there is quite a distinction between that and placer gravel, but I couldn't describe it; I couldn't get a color by panning.

Cross-examination:

Mr. Wells gave a bond for the Leadville on the 24th day of September, 1878, five months after he had entered the placer for patent. We hadn't found mineral on the Leadville at the time Mr. Wells gave the bond, neither had we found mineral in place in the Magnitude. Mr. Wells gave the bond agreeing to convey the Leadville to us provided we discovered a vein within a certain length of time after the date of the bond, some few months, I think. At the time the placer claim was entered for patent there was no vein struck within the placer. I don't think we filed our location certificate on the Leadville in 1878. The only places in which mineral had been discovered in 1877 and 1878, that I know of, were the Nisi Prius, the Pinnacle, the La Plata, the Rock, the Stone, and perhaps the Reddick. The discovery on the Nisi Prius is not within the placer.

86 MICHAEL NORRIS, a witness produced, sworn, and examined on the part of the defendants, gave testimony tending to show:

I have lived in Lake county since 1867; been placer mining since that time; know Wells and Moyer placer. Moyer worked his claims in the gulch about sixty feet wide. George Hayes and I located the Thomas Francis Meagher claim; it was somewhere about here (indicating within the boundaries of the Wells and Moyer placer). I don't know much about the map; I suppose it was within the present boundaries of the placer; talked with Moyer about placer in the fall of 1878; he said he was going to take my claim in; it didn't matter much, because he could only hold down to bed rock. He said Stevens was afraid to apply for a patent because the boys would adverse him.

Cross-examination by Mr. WOLCOTT:

Don't know whether there are any placer mines in Georgia gulch or not. I know about where — gulch is; sunk hole on the Meagher about thirty feet—about three hundred feet up the hill; I don't know exactly where — hole is; it is somewhere about here (indicating indefinitely within the placer). That 35-foot hole was all the work I did. The vein exposed didn't have any dip. I found it 30 feet from the surface. I don't know whether it was the same vein as the H. D. and Reddick or not. I couldn't see any lime; there was only porphyry in the hole; worked last in the hole in 1877.

87 P. J. GORIS, a witness produced, sworn, and examined on the part of the defendants, testified as follows:

Lived in Lake county since the spring of 1869; have been engaged in mining both lead and placer, principally lead; knew Moyer and Stevens. Moyer mined principally in California gulch, below junction of Eureka and California gulch; know Wells and Moyer placer. Moyer's claim averaged from 50 to 300 feet in width in the gulch; can't say whether placer mining was carried on on

Wells and Moyer placer outside of gulch or not. The ground was partly covered by timber; knew La Plata first in 1873 or 1874; Stone, Rock, and Dome in 1876; heard of Crown Point and Pinnacle in 1877; saw dump of La Plata in 1874; ore was a kind of carbonate; was never in the workings; never examined workings on Rock, Dome, or Stone; knew Gray Eagle claim in 1872; it is situated east of the Pennsylvania; worked on it; was working for gold at the time; drove tunnel through porphyry; knew Moyer Lode claim; was right between junction of California and Eureka gulches; was claimed by Mr. Moyer; never knew Moyer to work on it; never examined it; never knew of a ditch beyond Eureka gulch; knew Pennsylvania; didn't examine it; knew such claim was there in the winter of 1872 and 1873.

Cross-examination by Mr. WOLCOTT:

The Moyer lode was a gold lode; working it for gold at the time. The vein was vertical. The Gray Eagle was a vertical vein—a gold lode also; worked on the Montgomery lode west of Stone; material on top of my mineral was wash—dipped to the
88 northeast. The A. Y. was a vertical lode up to 1879; never tested ground upon Wells and Moyer — to see if it contained gold. Shaft of Pennsylvania is not on the placer.

ALBERT F. CHANDLER, a witness produced, sworn, and examined on the part of the defendant, gave testimony tending to show:

Lived in Lake county since 1874; am a miner; knew Pinnacle claim first in 1877; worked on it in June, 1877; helped take water out of the shaft; thought they had a vein there of carbonate ore; no drifting had been done from shaft; knew Reddick, and worked on it about the same time or afterwards; shaft on Reddick was sunk 50 feet when we struck water; shaft was sunk in porphyry; worked on the Nisi Prius early in the spring of 1878, one day. They were working on blue lime. They had porphyry and mineral, iron, talc, and lime. I should say it was dipping east; I couldn't tell at what angle; saw ore on the dump of Rock and Dome in June, 1877. Carbonate ore is generally found between porphyry and lime. The dip of the vein varies; have seen it almost perpendicular; have never worked very much in that section of the camp.

Cross-examination by Mr. OWERS:

Don't know the boundaries of the Wells and Moyer placer; cannot point out the discovery shaft of the Pinnacle upon that map; was not familiar with the ground in March, 1879. There was no connection between work on the La Plata and Rock. There
89 was nothing to indicate dip or direction of the vein. The work on the Nisi Prius was not within the boundaries of the placer. There was no shaft on the Nisi Prius sunk within the boundaries of the placer. The vein in the Nisi Prius, when I worked in it, was dipping towards the southeast. The veins vary in their dips around there from the perpendicular to fifteen degrees.

A. Y. GORMAN, a witness produced, sworn, and examined on the part of the defendants, gave testimony tending to show:

Am a lode and placer miner; have lived in Lake county 25 years; had mined eighteen years when I went there; knew Moyer, Wells and Stevens; placer mining was carried on along bed of creek in California gulch, extending 75 to 200 feet wide on either side; don't know of any placer mining that was carried on outside of gulch; Wells and Moyer worked in California gulch, between Nugget and Eureka gulches. There was some prospecting done for gold on the Wells and Moyer placer; located the A. Y. in 1869 on carbonate and iron; found it while placer mining in the bed of the creek; found vein on A. Y. between lime and porphyry, dipping eastward about 15 or 20 degrees; first knew Stone lode in 1875; Stevens came to gulch in 1871 or 1872; knew the Oro LaPlata in 1873; examined the dump but never examined the workings; they appeared to have the same mineral I found in the A. Y.; examined workings on the dump in the winter of 1878; there was 75 or 80 feet of a tunnel run in; a body of mineral around it; seemed to be the same
90 mineral as the A. Y.; noticed mineral on the dump of the Reddick; it seemed to be the same as A. Y. Carbonate ores are generally found in that district between porphyry and lime rock, and the dip of it is easterly from where it outcrops on the A. Y.

Cross-examination by Mr. WOLCOTT:

The Minnie was a perpendicular vein and was gold-bearing; it was a different vein to the A. Y. The ore on Carbonate hill, a mile away, looks very much like that on the A. Y.; don't regard the fact that ore from different mines resembles certain other ore as evidence that it is all from the same lode; suppose the A. Y., Rock, and Dome were upon the same vein, but the Minnie is a different vein; don't recollect seeing the fault shown on the model. It is simply my theory that the vein in the A. Y. and Minnie were the same. I never drove upon the dip of the A. Y.; the apex is down in the creek, and goes back on the hill as you go north.

Redirect examination by Mr. THOMAS:

They sunk down to the A. Y. on the Minnie; have no interest in the A. Y. or Minnie. The wash on the hill differs from that in the creek; one is wash, boulders, and gravel, smooth, while the wash on the hill is soft rock, and sandy and decomposed and angular.

JOHN THOMPSON, a witness produced, sworn, and examined on the part of the defendants, gave testimony tending to show:

91 Am a miner; have lived in Lake county from the spring of 1860 until the fall of 1878; know Moyer, Stevens, and Wells. Placer mining was carried on principally in California gulch; know the Wells and Moyer placer; prospected around Pennsylvania claim for gravel and also for lodes. I located Pennsylvania in 1869. I found the outcrop at the discovery shaft. I think my first discovery shaft was about 30 feet below where discovery shaft now is,

and east of it. The outcrop here runs pretty near north and south. The mineral was east of the line; examined dumps on the A. Y., La Plata; saw ore on dumps; knew Rock, Dome, and Stone. Stevens located all those; talked to Wells and Moyer about placer; it was after survey was made. I told them I would adverse them if they didn't give me a bond for a deed, which they agreed to do as soon as they got their patent, and we settled it that way; knew Moyer claim was located between Eureka and California gulches and owned by Moyer. Wells brought a brownish kind of ore from the Moyer claim and compared it with ore on Pennsylvania; knew 1860 lode, owned by Breese. I think it was within boundaries of placer: knew of two or three other lodes that cropped out owned by Burke and Dyer, who thought they were gold lodes, but they couldn't find gold in paying quantities in them and abandoned them; knew Ida lode, located in 1868 by Paul Ross. They claimed they prospected for gold, but didn't find it in sufficient quantities, and they didn't work it.

Cross-examination by Mr. WOLCOTT:

The deepest work I did on the Pennsylvania was forty feet. I passed through a little wash, struck the lime, and cut the vein about 20 feet from the surface; then crooked the shaft a little
92 and followed the vein, but the vein pitched too much and the shaft ran down into the lime below. The vein came to within eight or nine feet of the surface. No part of the Pennsylvania vein could come within the placer. I don't think it is the same lode as the A. Y. and the Dome, but think it is a different lode entirely. You find placer gravel in Georgia gulch. I found it in 1860 and 1861; found gold there, but not enough to pay at that time. There are a number of placers where you find gold that will not pay to work. The placer gravel in Georgia gulch hadn't so much wash in it. It was more mixed with sediment. The three gold lodes I have mentioned were taken up and abandoned because there wasn't sufficient gold in them; just merely a color. These gold lodes cross the gulches at different places below where I worked; sometimes every 25 or 30 feet would find a lode. It is true that in every placer-mining country there are apparent lodes which may or may not turn out to be lodes. Moyer may have known something about these gold lodes, but I don't think Stevens ever knew anything about them.

Redirect examination by Mr. THOMAS:

We prospected those small lodes for gold. They had indications of gold, but when you came to prospecting it it was not there. I prospected Georgia gulch lower down than the Wells and Moyer placer.

Recross-examination by Mr. WOLCOTT:

The Moyer lode was a vertical lode and supposed to be a gold vein. It was a different vein from the Pennsylvania.

93 GEORGE LEONHARDY, a witness produced, sworn, and examined on the part of the defendants, gave testimony tending to show:

Have lived in Lake and Chaffee counties for 24 years; have been engaged in placer and lode mining; have not followed placer mining since 1863 and 1864; know the Wells and Moyer placer; first knew it in 1879; know the Crown Point and Pinnacle—first, about three years ago; by hearsay, about six or eight years ago; have prospected on Rock Hill; first in 1868; saw outcroppings on Rock claim; they were iron carbonates; made lode locations upon that in 1868, but afterwards abandoned them; didn't know of any prospecting within the boundaries of Wells and Moyer placer for lodes in 1879. Quite a number of lodes were staked around it; have known of gulch mining being carried on on portions of the Wells and Moyer placer at the mouth of Eureka gulch; should judge ten per cent. of the claim had been worked for gold; it might be more and it might be less. The part worked was in the northwest portion. I knew Moyer very slightly. I think the Pennsylvania and the Five Twenty and the Seven Thirty were included partly in the Wells and Moyer placer and were located before 1878. I knew William H. Stevens first about fifteen years ago; talked with him about this territory in the spring of 1877 at my house in Riverside. He stopped that afternoon and over night. A number of men whom he had brought from Detroit had been going by. He expressed himself in a despairing way in regard to the country, saying it wasn't good for anything. I told him I was surprised at him expressing himself that way; that I thought his actions belied his words, bringing in so many men, unless he had an object in view.

94 After they went out he said: "Leonhardy, you were pretty rough on me this morning. I stayed here all yesterday afternoon to have a chat with you. I tell you the country is good enough, but if I tell my men what I have got there they will leave me and go on their own hook and take away what I have got. I spent last year over thirty thousand dollars up there in prospecting the country, and I found heavy bodies of mineral up there, and I know what I have got," and he stopped. He said he had found outcroppings; that he had examined the ground thoroughly; that he had shipped a quantity of mineral last year, and that it was a profitable operation, and he intended to go into it extensively. He said the examinations that he had made were such as warranted him in believing there was an immense body of mineral underlaying the whole country there, assaying silver and lead. He didn't mention any particular lode locations that he had made whatever. His mining in 1876 was carried on on Rock Hill, where the Rock and Dome were. I told him I had staked that country a good many years ago, and he said, "If you had stayed by it you would have had a fortune."

Cross-examination by Mr. WOLCOTT:

This talk was in 1877; I think in April, the year before the Wells and Moyer was located. Mr. Stevens didn't mention this particular

placer. He spoke of the whole country generally being underlaid with masses of ore. He didn't put it under those particular patches of ground. He led me to believe from what he said that both Rock and Iron Hills were underlaid with vast bodies of mineral. You couldn't tell anything about it at that time; it was simply a
95 theory. There were no other mines besides the Stone and Rock there in 1877. There was one dump on the Stone and one on the Rock. I think that was all there was there when Mr. Stevens made his prediction to me. There may have been more, but I wasn't aware of them. The Five Twenty and Seven Thirty were supposed to be perpendicular veins. The Five Twenty is on Printer Boy Hill and doesn't touch the placer at all. There was a hole on the Pennsylvania about 14 feet, sunk in wash, showing a flow of mineral, but not in place. It was of a decomposed nature. I think the vein in the Pennsylvania dips more to the south than the east. The vein may touch the placer, but I haven't examined it. I have been working on the Vermont, in a shaft 600 feet deep. They went through about 15 feet of wash, and I have sunk since the entire distance through porphyry. It hasn't yet developed a lode. I should call the dip of the Pennsylvania at least fifty degrees. We have been expecting to strike the Pennsylvania in our shaft almost every foot. The Vermont shaft is east of the placer. I don't know of any placer work done in Georgia gulch on the Wells and Moyer placer, but where it empties into California gulch there has been some work done. There is a sag on the Wells and Moyer placer, but not such as I would call a gulch. I should recognize the photograph numbered "3" introduced by defendants. It shows Georgia gulch. I should judge from the photograph that it passed through the Wells and Moyer placer.

Redirect examination by Mr. THOMAS:

Think the placer workings in Georgia gulch are about a mile or a mile and a half below the Wells and Moyer placer; have heard the upper part of Georgia gulch called Coon Valley; shouldn't
96 call it more than a slight sag or depression. Rock Hill is the hill principally taken up by the Wells and Moyer placer.

C. G. ARNOLD, a witness produced, sworn, and examined on the part of the defendants, gave testimony tending to show:

Have resided in Leadville 25 years; am a placer miner; have mined principally a mile or ¾ of a mile above Leadville; know Rock Hill; know the La Plata claim. First know of the existence of carbonates on Rock Hill some time about 1874 from the dump of the La Plata. I know the boundaries of the Wells and Moyer placer. I know William Moyer and Thomas S. Wells since I went into the gulch. Moyer worked the upper end of the gulch, opposite Oro City, on the eastern part of what is now the Wells and Moyer placer. The claim was then 50 or 60 feet wide, the lower end towards Nugget gulch. I should say opposite Oro it widens out to two or three hundred feet. The claims at that time were called gulch claims, side

claims, or patch claims; never saw Moyer working on the side claims Placer gravel is gravel that has been worked by the action of water and deposited below its original location. The boulders, large as well as small, are washed and become smooth and rounded, and so is the fine gravel; where they have not been moved much they are sharp; prospected on the Wells and Moyer placer some time in the sixties; didn't find any placer gravel of any extent there. I prospected up Georgia gulch. Georgia gulch is a dry gulch, except in the spring; am not familiar with the Crown Point and Pin-
97 nacle mines; I knew of them; think these ditches were used to carry off the water from the Florence mines. There is no water in them now.

Cross-examination by Mr. WOLCOTT:

From examining the dump upon the La Plata couldn't get a very accurate idea that it was a lode; didn't get any information from examining the dump, because we didn't know what carbonates were. We often found them in the gulch below while placer washing. We called them, at that time, galena. They were of no consequence to us because there was no way to machinery. The gulch claims were 100 feet wide. We prospected all over that hill about a thousand feet, in California gulch, in Georgia gulch or Coon valley. We found very little gravel and occasionally a color or trace of gold. We went to bed rock in Georgia gulch and found two or three colors and a trace of gold; didn't regard it placer ground because it didn't bear gold enough. I consider placer ground gravel that bears gold.

Redirect-examination by Mr. THOMAS:

Most anywhere in that country you can find a color of gold, a very fine leaf of gold.

BENJAMIN BARNARD, a witness produced, sworn, and examined on the part of the defendants, gave testimony tending to show:

Have lived in Lake county since 1865; am a miner—both
98 lead and placer; know the Wells and Moyer placer. I knew William Moyer; knew the La Plata lode claim. A shaft was sunk down to mineral in 1872—hard carbonate; knew the A. Y. It showed carbonate between lime and porphyry. First knew the Rock and Dome in 1877; saw the dumps with carbonate ore on them. I knew Wood and Stevens. First knew the Crown Point and Pinnacle in 1877; knew the 1860; knew William Moyer. He mined in California gulch within the boundaries of the Wells and Moyer placer, about fifty feet on each side of the center; worked in that part of the claim four or five years; talked to Moyer about the claim on account of the conflict with the 1860. He said Stevens would either buy it or deed it back. My understanding of the conversation was Mr. Stevens was going to buy the placer as a placer claim. I asked him what he wanted with the bluff that the 1860 was on. Moyer said it is Mr. Stevens' plan to take up this ground; the timber on the ground is valuable, and then it is expected there is

mineral under it; talked with Stevens when I sold him the 1860 lode, early in 1878, in regard to the placer; said he was anxious to get a good title to the property, and wanted no conflicts afterwards. I think he spoke about it being underlaid with mineral, but I don't recollect positively about this. I know that he said he was going to buy the ground or had bought it. The 1860 was partly on the Wells and Moyer and partly on the Moyer, which joins the Wells and Moyer on the north. I am the same Barnard whose name appears in the location certificate of the Wells and Moyer placer.

Cross-examination by Mr. WOLCOTT:

I think the 1860 was a gold lode. It belonged to Captain
99 Brees, and when he died it came in my possession as administrator. I never saw any mineral of any kind in it. I sold it for fifty dollars; was never underground in the La Plata or the Rock or the Dome. The only other mines, except the A. Y., Rock, and Dome, that I knew of around there were the 5.20 and the 7.30, which were gold lodes, vertical veins. I formed my idea that the vein dipped to the east from the working on the La Plata where they struck the mineral four or five feet in depth, and again where they struck it 12 or 14 feet in depth. I think it dipped east; the Pennsylvania also dips east; the Pennsylvania and the La Plata may be upon the same vein; it may be the same lode from Leadville to the top of Mosquito Range.

I. F. EVANS, a witness produced, examined, and sworn on the part of the defendants, gave testimony tending to show:

Have lived in Leadville off and on since 1860; know Rock Hill and the Wells and Moyer location; don't know of any placer ground on top of Rock Hill. Placer diggings are what we call gravel mingled with gold. There is no wash on Rock Hill. I worked the placer in the gulch here (indicating) about 40 or 50 feet wide, what we call the pay streak, the wash was wider; we put in cribs and never worked it over 80 to 100 feet. First met Stevers in 1877; had very frequent talks about the line of outcrop of the vein being on the Iron, the Bull's Eye, the Lime, Stone, Rock, and Dome, I believe, was the last; the Iron Mining Company's locations follow the line of outcrop from the Iron mine south to the Dome and Rock.
100 I think the conversation occurred in the month of September, 1877. We were talking about the whole of that string of claims. We were talking about the boys who were locating to the east of the apex, and I told him I wouldn't locate to the east of those mines, as I believed he would eventually drive me out, and he said: "Yes, Mr. Evans, I will drive all those people out who locate east of me, for I have got the apex across California gulch to the hill on the south side of California gulch, between that and Oro." He was then talking about the iron mine north of the Wells and Moyer placer, situated on Iron Hill. I have been in that mine. Stevens claimed that the locations mentioned were on the outcrop of the same vein and included the Rock and Dome. Rock Hill is south of

California gulch and Iron Hill north; worked some on the vein that is now known as the Rock mine in 1861. The workings at that time were a tunnel 75 feet in a mass of brown carbonates and black iron. I was in the workings of the Rock in 1877 and 1878. They had no particular walls at that time. We had a public meeting at the time the surveyors of the Atchison, Topeka and Santa Fé road came to Leadville, in the latter part of September or early in 1878. A banquet was given to the first engineers surveying a road there. Mr. Stevens illustrated the geology then as he always did in his talk with me, that this strata or layer of ore followed the lime in a bed.

Q. Tell the jury what he said as to its pervading character, how much of the country it followed, and how far it extended, in his opinion?

Objected to by plaintiff's counsel because Mr. Stevens' opinion would have no effect upon the fact.

The COURT: You can never prove the thing in any other way.

101 To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. Well, he delivered a sort of lecture upon the facts as they had then developed themselves. He said the vein ran from the north to the south and dipped to the east; that he had the apex of it and the outcrop and could follow it under this ground, showing immense bodies of ore and the richness of that country. His descriptions extended on the outcrop from Stray Horse to beyond California gulch. He said in his address that it underlaid the whole country from Leadville to the Mosquito Range, about five miles in a direct line. His developments at that time hadn't gone to any very great extent. There were no claims that I know of on the placer in the spring of 1878.

Cross-examination:

When the public meeting was held which I have referred to, the only development Mr. Stevens had on the Rock was a tunnel run south 150 feet; am not certain where this tunnel was, but think it was on the Rock. There was another tunnel, either on the Rock or Dome, run 80 to 100 feet. There were slight workings above on the hill, I think, simply the starting of a shaft. The Iron mine is over three thousand feet away; it had a number of cuts between the Iron and the Bull's Eye. The shaft they were working was between 20 and 30 feet deep. Those were practically all the developments Mr. Stevens had on the property at that time, in the spring of 1878. There were no other developments that I recollect. It was on these developments Mr. Stevens based his opinion that there was a vein running from three to six miles, and that he controlled the
102 apex of it on his locations; am familiar with Fryer Hill, further to the east. The mines on that hill are upon another dip of the same vein and upon a lower contact. There was great

diversity of opinion at the time of the public meeting as to where the veins were. It was only a matter of opinion with anybody.

Q. If Mr. Stevens was right in his suggestion and here was the apex on the Rock and Dome and he had the vein it would take in all these workings, would it not, (indicating workings on the territory in dispute)?

Objected to by defendant's counsel because wholly immaterial; which objection was sustained by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

A. It was not a geological lecture Mr. Stevens was delivering, but it was his opinion, based upon what he saw there. He said the dip would go into Mosquito Range. I should judge the speech was made because the railroad men were there for the purpose of showing there was sufficient ore in the country to warrant them in building a railroad.

ANNIE J. GETCHELL, being sworn, testified that she was a stenographer and took the notes of the testimony of C. C. Baldwin in the former trial of this cause: that she correctly transcribed said testimony and gave — to Mr. Thomas; the copy so made and delivered was full and complete.

103 C. S. THOMAS, being sworn, testified that he condensed the testimony of said Baldwin from interrogative to narrative form for purposes of brevity, and then submitted same to opposite counsel, who approved it. The bill was then signed and the cause went to the Supreme Court.

Defendant's counsel here offered to read the testimony of C. C. Baldwin, now dead, given at the former trial, as contained in the printed bill of exceptions.

Objected to by plaintiff's counsel for the reason that the testimony has been changed from question and answer to narrative form; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Testimony of C. C. Baldwin.

I am a civil and mining engineer, and have been since 1872; have lived in Leadville and practiced my profession there seven years and a half; known William H. Stevens since the spring of 1877; know Mr. L. Z. Leiter; became acquainted with him when he bought into the property in the fall of 1877. I know Thomas S. Wells and William Moyer; have known Crown Point and Pinnacle since the summer of 1877; know the Oro La Plata; it is the oldest location on Rock Hill. In the fall of 1877 and early in 1878
104 I made surveys that were intended for patent on the Pinnacle lode; examined last Sunday, the 16th of the present month (November, 1884), the Crown Point and the apex; also made an examination for the purpose of determining Pinnacle

claims for the purpose of determining dip of the lode. I found, in the extreme westerly workings of the Crown Point, where it is indicated by this drift here, evidences of an outcropping lode. At both these points drifts have been run in the wash. A little east of the point here are evidences of a foot wall, which I would consider in place, and also the hanging wall in porphyry in place. Then, in passing down in this direction, easterly, the foot wall and contact could be seen and readily shown, as in this map. It was a continuous vein from the westerly extension of the Pinnacle workings from the east shaft number one, called here the Crown Point shaft, and then went down the working shaft and made examinations through the different levels, from the extreme west to the eastern part, finding in a good many places a contact showing porphyry above and lime below, and in some places the drift was in lime, with mineral contact and the vein above, on account of its dip. I noticed in all the workings a dip in an easterly direction, amounting to from 15 to 18 degrees from the horizontal. The mineral deposit was continuous, with the exception of a few places, where the development had gone through the lime. I have been familiar with the H. D. ever since 1877. I was informed by Mr. Stevens that they were intending to let the Wells and Moyer placer men in this vicinity get a patent on the ground which lay to the south of the Rock and Dome and deed to them—get a patent in their own name, which was afterwards done. In conversation from time to time with Stevens he had the idea——

Mr. WOLCOTT: We object to Mr. Stevens' idea.

105 The COURT: I think he can state it.

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

That the lode exposed along the line of lode claims extended in the east direction on the dip, and that by taking up placer claims on the outside they could keep parties from getting patents on them and keep parties from sinking further down on the dip and save trouble that way by getting title to the surface ground, and it was also for the timber that lay on the claims; but it was for the purpose of protecting the title to the lode claims; there were no placer improvements; there was a shaft sunk just west of the Crown Point—two shafts; it was on the Summit lode; the westerly shaft, which was the discovery shaft on the Summit lode, was sunk — like 15 or 20 feet deep and had struck—1877; it was owned, I think, by a man named Cal. Donaldson; I was one of the owners; the Gnesen was owned by McDonald. I went down the discovery shaft of the Gnesen, which is located in here, or at the time I made the survey; that was in 1877; the developments of the Gnesen showed crevices of porphyry; the depth of the shaft, I think, was about forty feet; it was not sunk to contact. I haven't examined it since it was sunk to contact; have not made an examination of the La Plata since 1877; I did then. The discovery shaft of the La Plata was then located at this point, at a strip about fifty feet wide, and disclosed mineral in rock in place at the side of the discovery shaft. I

think there had been a little winze made by the prospectors in 1877. I knew at that time of a claim called the Summit; that is at the west end of the Crown Point and Pinnacle; that is the ground now comprised in the Wells and Moyer; it was
106 located by Mr. Wood and Stevens. It was located in 1877. I made a survey, including the Gnesen, and I also made a survey of a portion of this placer, which would be about the west half or west third extending in this direction (indicating). I think that was in the fall of 1877 or early in 1878. It was made for Stevens and Leiter. It was then known as the Wells and Moyer placer. The Wells and Moyer placer claim was on what was known as Eureka gulch, indicated here by that boundary, and along California gulch, near its mouth. When it was surveyed it was called the Stevens and Leiter placer. I was employed at that time by Messrs. Stevens and Leiter to make several surveys for placer claims—one on the north side of Iron. I couldn't say whether it was iron in place or not.

On cross-examination this witness states:

I didn't trace this vein continuously, sir, all the way from this little piece of outcrop near the west end of the Crown Point down through these workings. There was a little gap here and there, caused by the workings not connecting on the vein. So far as I am able to judge from the present developments, I think it is continuous. These irregularities are characteristic of a contact vein in that district. I have had considerable experience with that contact vein and almost many miles of working on it. I know where the Rock and Dome claims lie. I am somewhat familiar with these claims. I have seen the outcrop of the Rock and Dome claims in some of the workings. I am somewhat familiar with the outcrop on the Rock lode. The apex, which is represented on this map by a long line drawn here yesterday with a pencil by Mr. Page, I think that about correctly represents the line of apex and outcrop of
107 the vein where it crosses the end line of the Rock and then leaves the side line and passes onto the Dome. There is a pretty large outcrop at the Rock lode, an unusually well defined outcrop. There is a good deal of broken rock; it might — called an outcrop; it is an outcrop at several points. I know these workings along this outcrop. If I were to produce the northerly end line of the Rock claim indefinitely forward and downward, and also to produce another line across the Rock claim parallel with that end line indefinitely forward and downward and crossing the claim at a point where the apex leaves the Rock claim and passes onto the Dome, and from the Dome to the Rock, it will, in my opinion, include this part of the vein in dispute in this case. If I should produce forward and downward the westerly end line of the Crown Point claim and then produce forward and downward another line drawn to the point where the apex as shown in this map passes over from the Crown Point claim, that would not include any portion of the downward portion or dip of the vein in dispute. I was acquainted with the Wells and Moyer placer in 1877 and 1878. I

know of their working placers in Eureka gulch. I did not know at that time of their purchasing a large number of placer claims around on the gulch and a portion of the side hill, covering nearly the whole portion of this patented claim. I think that in 1877 and 1878—the latter part of 1877—the ground embraced in the westerly portion of the Wells and Moyer claim was vacant ground. A portion of it not owned by Wells and Moyer—the westerly portion of what is now known as the Wells and Moyer placer—was vacant ground. I have been frequently over that ground making surveys and making maps of that territory, and I
108 never found any description of the Wells and Moyer placer at that time that covered that territory. If this portion was located and owned by the Wells and Moyer placer in 1877, it was very late in 1877. I think it was in 1878, for the consultation occurred early in 1878. Yes, sir, on this northeasterly portion of the placer diggings there have been considerable diggings from Eureka and California gulches which are within the boundaries of this placer claim. There have been many placer claims possession titles there which existed since 1860, and a portion of these claims along Eureka and California gulches are included in this Wells and Moyer placer now. Wells and Moyer were not actually carrying on quite extensive placer mining when they applied for this patent. They had gone to expense in bringing what is called the Iowa gulch ditch to get water on that property on this placer. They were carrying on placer mining there with the water that was in this ditch, which they brought in at and before the time they applied for the patent.

On redirect examination the witness states:

The proportion—that is, the amount of actual placer ground on the Wells and Moyer placer compared with the entire Wells and Moyer placer—approximately would not be over five per cent. of the area; from five to ten per cent.

HENRY D. BATES, a witness produced, sworn, and examined on the part of the defendants, testified as follows:

109 Lived in Lake county from the spring of 1877 until 1886. I am a civil and mining engineer; first knew William H. Stevens in the spring of 1877; knew Wells and Moyer first in the summer of 1877; became acquainted with the workings on the group of claims, now known as the Iron Mining Company's claims, that year, commencing at the Iron mine and extending around on Rock Hill, including the Dome and Pinnacle, by making surveys on that hill for Stevens and Leiter. Up till the spring of 1878 on the Dome mine there were two shafts sunk to the vein with a drift connecting them. In the Rock mine there was a tunnel driven with considerable development either side of it; I can't remember now how much; know the Pinnacle. There was a shaft sunk to the vein. On the Stone there was a shaft with some development in the bottom which disclosed the vein, and there was some development on the 76; that is all I remember. The vein was disclosed in those

several workings; had a hanging wall porphyry and a foot wall of lime. The dip was to the east and the strike was in a northerly direction. Each one of the claims located by Stevens and Leiter disclosed ore and disclosed a vein. The development wasn't very extensive, however, at that time. It was my opinion then that they were all on the same vein, based upon the developments then made. Those developments covered the strike of a vein some ¾ of a mile, as I remember it, commencing with the Iron mine on the north and ending with the Dome mine on the south; have heard Stevens, prior to the summer of 1878, make statements concerning the vein on Rock Hill. I heard him state that it was his opinion that there was no doubt of its all being one continuous vein, and that it underlaid the whole country from that outcrop until the next break in the limestone to the east, and
110 that it was his opinion that these ore bodies ran to great depth in the mountain. He was speaking of the ore bodies on Rock Hill as well as the others. He called it a contact vein. A contact vein is a vein lying between rocks of different formations. I surveyed the whole of the Wells and Moyer placer in February or early in March, 1878, at the request of William H. Stevens, whose agent paid me. His agent at that time was Mr. William Borden. Stevens marked out, on a map in lead pencil, the ground which he wished me to take in by this survey. The marking was done in Leadville, on a map of the Iron mining claim as then located. Mr. Stevens took the map and marked out the ground he wished me to take in in making the survey. He told me to make the survey and follow the lines as nearly as possible, and to leave out such claims as were owned by other people and where they were *bona fide* claims. A portion of the Wells and Moyer placer along California gulch was the only ground which actually had placer working on it at that time. Stevens gave reasons for taking up the ground as follows: He stated he thought this vein ran under that ground, and that he thought if he had the surface rights to this ground he could prevent litigation by keeping outsiders off it. William Moyer and another man named Stone helped me to make the survey, with one or two others, whose names I don't recollect. I began the survey on the north side of California gulch, following generally the direction of the gulch up to above the town of Oro, crossed the gulch and down a little way and then up the hill. When I came to the point where we started up the hill Mr. Moyer wanted to know why I was going in that direction. I told him those were my instructions, and he said he didn't understand it that way by Mr.
111 Stevens.

The plaintiff, by its counsel, here objects to admissions of Moyer unless knowledge is brought home to Mr. Stevens or unless the admissions were made in Mr. Stevens' presence.

The COURT: Under such circumstances the admissions of the principal and the agents are all in.

Mr. WOLCOTT: The agents, without the knowledge of the principal?

The COURT: Yes, sir; if done at the time the work was going on—statements.

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Moyer said he didn't understand that that part of the ground was to be taken in by a survey, and I told him they were my instructions and I had to make the survey as I was told to make it. I explained to him that I didn't understand it any other way, and went on with the survey. He assisted me with a large part of the work. When he said he didn't understand the survey was to take in certain ground he referred to the upper part of the hill, away from the gulch to the south. I surveyed the claim first into two tracts—that is, two claims—under Mr. Borden's directions. He was Mr. Stevens' agent at that time, and Stevens' and Leiter's attorney. He gave as a reason for surveying it into two claims, first, because the whole ground together would be more than 160 acres, and that 160 acres was the limit which could be taken up in one claim, and by making two claims the whole of the ground could be located. The two locations were immediately consolidated into one claim by metes and bounds. What I mean is this: The two location cer-
112 tificates were put on record at once and then deeds were given by the locators to Wells and Moyer, and then the amended location certificate was made consolidating the two claims into one claim. I heard Mr. Stevens deliver a public lecture upon the geology of that district. I have heard him speak before quite a number of people on this mining district at least once prior to the summer of 1878. He gave a dinner party one night to quite a large number of gentlemen in Leadville, and in his office where the party was he had a blackboard and he discussed the formation there and illustrated his theory as to the formation on the blackboard; made some considerable talk about it, and some of the other gentlemen also made some remarks about it. His sketches included all territory between Leadville and the top of the range, and quite a long distance north and south; he didn't mark the claims down, but remarked that his drawings were intended to represent the formation—the geological make-up of the country. It included the showing of a vein. He claimed that these veins ran north and south through that country and dipped to the east, and that they would be found and had been found at the different breaks of the limestone, and that when they were opened up they would prove to be of great extent and Leadville would be one of the greatest, if not the greatest, mining district in the country. The talk and illustration included Rock Hill and all of the territory in that section, together with that portion covered by the Wells and Moyer placer.

Cross-examination:

Received my education at Michigan; first experience in mining was at Leadville. The dinner party I have mentioned was
113 in the winter of 1877 and 1878; it was not exactly a public meeting; it was a private dinner party and the people there

were his guests. I was an invited guest there and I heard him make the statement that he thought these lodes underlaid the whole ground as far as Mosquito Range, and that he based his opinion upon developments in the Rock, the Dome, the Stone on Rock Hill, and others upon Iron Hill, but not upon those alone. He also spoke of the developments on Carbonate Hill and some developments further to the east. I was not familiar enough with mining business at that time to have much of an opinion myself in regard to those things, but I believed in Mr. Steven's theory, that they underlaid the whole country. I had nothing to base it on except the slight developments there on Rock Hill and others here and there (indicating). I couldn't say from the developments how far it went, but I was of opinion that it dipped in the way it started in. I inferred that it went as far as the next break in the limestone, but I couldn't tell how far east that would be. There were no developments to show that it was or was not near there. Nobody could say how far the vein went. The developments at that time were two shafts on the Dome, which went through porphyry and wash forty to sixty feet deep and a drift from one shaft to the other, as shown on plaintiff's map. I think shafts were about 50 feet apart; they showed the dip; there were no other workings on the Dome. On the Stone there was a shaft with 30 or 40 feet of drifts from the bottom showing the vein. If I recollect right, the shaft on the Pinnacle was sunk a little over a hundred feet, but there were no drifts from that; there was a tunnel on the 76 which lies under the Rock,
but I don't think anybody could judge from the developments
114 on the 76 of the dip of the vein, because the workings were below the vein. It was upon these developments that Mr. Stevens and myself formed our opinions. The apex of that vein runs about down here (indicating through Rock and Dome onto Stone). Stevens stated to me that if he could take up this ground here (indicating the placer) he could save litigation and conflict arising from the claims of people who would take surface ground along there and sink down to the vein of which he had the apex; that was also my opinion. There were at that time a number of surface claims taken up east of the apex, and they were continuously taken from that time on. From the time I went to Leadville up to the time this Wells and Moyer placer was taken up nobody had filed lode claims along there.

AL. HATHAWAY, a witness produced, sworn, and examined on the part of the defendants, gave testimony tending to show:

Have lived in Colorado some 14 years—Park, Lake, and Chaffee counties; lived in Lake county continuously from 1878 till 1883; was in California gulch in 1877 to look after some work being done by my partners on Rock Hill, situated near or adjoining the 76 lode, on a claim, I think, called the Clara; at that time examined lode claims in vicinity—the La Plata, William Reddick, the Dome and Rock, locations which had just been started. A large amount of low-grade iron ore was disclosed on the Rock in an open cut or tunnel. They were taking ore out of the shaft of the William Reddick. The ore in the Rock and Dome and that on the Reddick

seemed to be identical, except that perhaps the Reddick
115 had more lead in it. The first I knew of the Crown Point and Pinnacle I was over there with Mr. Meyer, who was working there; he had just started in. I think it was in 1878, along in the spring. I saw the workings. There were one or two shafts there. They were sinking a shaft. I don't remember seeing any ore on the dumps; have met Mr. William H. Stevens; knew him in Park county; met him in 1877, on my visit to California gulch. I was very anxious to talk with him. He was the only man, we supposed, over there in Park county that knew anything about the country over there—he and Mr. Wood; they had located it. I asked him about some ground there. I asked him, as I was not a miner at all, about information as to how to prospect, &c., and he gave me a general idea how the limestone and porphyry formed, what his theory was, and how the mineral laid between it, and what he had got staked out through that country and how extensive it would be. He said he thought it would be found over in the next gulch, which is Iowa gulch. He said it could be followed through on that contact clear to the South Park. He said, inferring from the formation, if it laid flat it would be very large bodies. He was moving his hand up and down straight across Iron Hill, where he had started some workings there, and there was some work being started on the Smuggler; and he was telling me how he and Mr. Wood had located their claims clear through there, and showed me — they were, in a general way, following the formation and giving me an idea how they prospected; and he said then that it underlaid this whole country off to the east of there.

Cross-examination:

I think the conversation with Stevens was in May or June,
116 1877. I have heard Stevens express himself after Leadville opened that the whole country running from Summit county across Mount Bross and Mount Lincoln and over across Mosquito Pass and the whole belt down through California gulch was underlaid by a vast deposit of mineral.

Q. When you saw these developments that you have described, in 1877, I will ask you whether it could be possible for Mr. Stevens to have known that Rock Hill was underlaid by a lode or mineral body?

Objected to by defendants' counsel.

Mr. WOLCOTT: The testimony turns upon knowledge; the case turns upon knowledge. Now, if I can show a person could know a thing or could not know it—not that he can testify to himself that he knows or does not know, but anything which would be competent to prove or show that a man could not physically have known that it could be but a surmise, that he couldn't have knowledge—would — be competent in his own behalf to support his own testimony that he didn't know?

The COURT: The question is not a proper one.

To which ruling of the court the plaintiff, by his counsel, then and there duly excepted.

At the time of our talk Stevens seemed to be quite satisfied with what he had got there. He thought they had laid it out just right, so as to cover the outcrop. He told me that he had the outcrop, and showed me what he had. At different points it opened up a continuous vein and he claimed it took the whole thing in.

117 NELSON HALLOCK, a witness produced, sworn, and examined on the part of the defendants, gave testimony tending to show:

Have lived in Colorado nearly 26 years. I was in Lake county pretty much all the time from the summer of 1874 until 1883. I was cutting lumber. I took a contract from Stevens and Wood for cutting lumber for the flumes and ditches, and so on. I was mining there from 1877 on. I first knew of the Rock and Dome in 1875. There were only small workings on the claims at that time. I saw only the Rock, and probably the Dome. He had little holes dug there, and he showed me some galena he had got out of the developments. It was only a small hole. In the summer of 1876 they commenced working in the Rock and Dome, taking out ore, which they shipped to St. Louis, I believe. The ore was found between porphyry and lime. The developments were not sufficient to show the lime continuously. The general dip of the mineral was to the east, varying from 15 to 20 degress. They worked a good many men on the Rock in 1877. I was underground in the La Plata in the fall of 1877 or 1878. There was a tunnel started in from near the gulch, perhaps a hundred feet, crossing the vein. It showed the vein dipping slightly towards the east, the same as in the Rock. I first knew the Crown Point and Pinnacle in 1877. I went up there with Mr. Tam. They were sinking a shaft and were down some 60 or 70 feet, but not through the porphyry. I afterwards was an owner in the claims. I examined with reference to purchasing, in December, 1879, I think it was. There was a shaft then 108 or 110 feet deep and some drifts at the bottom. They got down to contact and ran a drift off to the east a little way, and I believe there was a drift run from the Dome that connected with it. I know I went down
118 the shaft in the Pinnacle and through the workings of the Rock and Dome, I think, some time in December, 1878; have no interest in any of these properties now; had several conversations with Mr. Stevens. One I remember particularly at the Rock and Dome in June or July, 1877. Mr. Stevens was talking and explaining to me what a big thing he had there, and was showing to me the ground they had located up north towards the Iron mine; you can see pretty nearly there from the Dome. He told me they had all that ground located, and that they had the outcrop. I suppose it was six or eight thousand feet, the space of five or six claims, running 1,500 feet to the claim. He said they had the outcrop from the Iron onto the Rock and Dome, and had the same kind of ore they had on the Rock and Dome. He said: "We have the same

contact and the same vein over there and along this hill here on the Rock and Dome;" that the general dip of the vein was to the east, but that he had located the outcrop and would hold the vein as far east as it went. Later, in the fall of 1877, I talked with Stevens about the expediency of locating placer claims up there. Stevens said he wanted to locate some ground up on Rock Hill, and he mentioned between Oro and the Rock and Dome. Mr. Wood objected. He said: "I don't believe in taking up placer claims where no water can be got on the hills." He said: "There is no water to wash, and I don't believe we can hold the ground for placer claims." Stevens referred him to Leadville and the Thomas Starr placer and the Oro placer, and Wood said: "That is all right, because we have got a ditch there; because we can wash gravel there; if there is any pay we can wash it." Mr. Wood objected to taking anything on the hill, and he said he wouldn't be a partner in taking up placer claims on the hill where there is no water. I don't
119 know exactly what Stevens said, but I know he advocated the thing.

Q. What did he say in regard to questions of economy in taking up the ground?

Objected to by plaintiff's counsel on the ground of immateriality and irrelevancy; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

He said there was some valuable ground on Rock Hill and he wanted to locate it; that if it were located as a placer it could be done at a good deal less expense than by locating it in lode claims. He said the necessary work would have to be done on each lode claim—that is, five hundred dollars' worth of work in order to get a patent on it. He said we can use the gulch where it has been worked, and I remember he mentioned Eureka gulch and the workings there, to obtain the placer patent. He said he could take a larger quantity of ground with a good deal less expense than go at it and locate it as lode claims. I know Moyer and Wells; they were working in Eureka gulch in the fore part of the summer of 1878. I had conversation with Stevens in March, 1878; I was running my mill and getting my timber at the head of Georgia gulch, and these placer claims take in part of the timber up there. I was talking to him one day about the timber; I said: If you are locating miles of country as placer ground, it is going to cut me off from getting the timber, and he said: You only want saw-timber, and I told him that was all I was interested in, and I said: I can't furnish you folks with lumber without getting some timber and he said: You can go ahead and cut what timber you want up
120 there and say nothing about it; that was at the head of Georgia gulch. I told him that I didn't know but what I would have to adverse him if he was going to claim the whole country; I had to have some timber, and that was the only visible place I had to get timber from, and he said I could take all the saw-timber I wanted.

Cross-examination by Mr. WOLCOTT:

Didn't work on the Pinnacle prior to January, 1880. Mr. Stevens claimed he had the top or outcrop of that vein which underlaid this country. Mr. Stevens, when talking about it being cheaper to locate ground as placer than lodes, said that they ought to locate it because it was cheaper as placer; that he had the top, apex, or outcrop of the vein, and was entitled to the whole country anyway, and that they would hold their vein to the east. The tunnel on the Rock in 1877 was run in near the outcrop. The outcrop was a little further west than that. There was 28 feet of ore exposed in that tunnel. On the Dome above there, there were two shafts. They were not far from the center of the claim; they showed ore in both places. Late in the fall of 1877 they hadn't struck ore in the Pinnacle. I don't know that there were any other developments there at that time. I wasn't interested in the hill at all; was simply looking around. I looked over the hill pretty thoroughly. I wasn't able to tell from the developments I saw there at that time anything about the extent or character of that vein. I don't pretend to be a geologist. I afterwards expended a large amount of money—some fourteen thousand dollars—trying to find ore in this same Pinnacle claim.
121 I never found it in paying quantities. It was after Mr. Stevens told me that he had the top, apex, or outcrop of the vein that I bought in the Pinnacle lode and spent some fourteen thousand dollars trying to find ore. I had an understanding with Mr. Stevens that the Pinnacle and Crown Point should be exempt, and that he didn't claim them at all.

Redirect examination:

I found the contact between lime and porphyry and some mineral. It was vein matter, but not sufficiently rich. I didn't go deep enough. Had I gone six inches deeper in some places I should have found the mineral. I had the understanding with Stevens in 1878, just before I purchased it. I saw him and asked him if he had any claim to it, and he said it wasn't included within the placer patent, and he had no claim to it at all.

Defendants' counsel offer in evidence a certified copy of the location certificate of the Moyer lode, dated December 9, 1867, signed William Moyer, J. Moyer, and Michael Norris.

Mr. WOLCOTT: At the time the testimony was admitted by the court to show other developments of mineral about this property it was admitted, as we understood it—and I think we are not mistaken—upon the assurance of counsel for the other side, that this testimony was to connect these workings with the vein or lode under which the defendants claim possession of this property. No such connection has been shown from the outset.
122 This offer of a location certificate of the Moyer lode, which, as your honor may remember, is in the extreme northeastern corner of this property, between Eureka and California gulch, and which has and can have no possible bearing upon the defendants' claim or rights under the issues in this suit.

The COURT: I think it is admissible, whether it be the same lode or another.

Mr. WOLCOTT: Without it being connected in any way with the other workings?

The COURT: Yes, sir.

Mr. WOLCOTT: I will ask your honor, upon what theory? Whether it was a known lode?

The COURT: To show the character of the ground, whether it was placer ground or ground in which parties might expect to find lodes.

Mr. WOLCOTT: There is a further objection—that it has never been shown that any of this Moyer lode was within the placer, and it has been shown that, like all the others, it was long since abandoned, and I think more than one witness in fact stated that it had long since been abandoned.

But the court overruled the said objection; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Mr. OWERS: It has not been proved there was any development work upon the Moyer lode within the placer; simply that the claim extended across the extreme northeastern corner of the placer. As I understand Judge Brewer's ruling in the case of the United
123 States against The Iron Silver Mining Company, the mere location of claims cuts no figure. There must be the development of a lode. This development of a lode has not been shown by one single witness. They don't show there was any mineral whatever within the boundaries of the placer demonstrating that a lode existed within the boundaries of the placer, although the claim did to a certain extent lap over it.

The COURT: The ground was immediately contiguous to the claim, and it is admissible as well as though it had been upon the claim.

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Defendants' counsel offer in evidence the location certificate of the Thomas Francis Meagher lode, signed by George Hays and Michael Norris, dated the 7th day of June, 1875.

Objected to by plaintiff's counsel for the reasons above given, which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Defendants' counsel offer in evidence amended location certificate of the Pennsylvania lode, dated the 17th day of June, 1878.

Objected to by plaintiff's counsel for the same reasons as above, and because the claim lies entirely without the placer.

Which objection was overruled by the court; to which ruling the plaintiff, by its counsel, then and there duly excepted.

Also a certified copy of the location certificate of the Wil-
124 liam Reddick, dated the 11th day of August, 1877.

Objected to by plaintiff's counsel because it lies entirely outside of the placer and for the reasons above stated; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Also the location certificate of the Summit lode, signed by Alvinus B. Wood, dated the 28th day of December, 1876.

Mr. WOLCOTT: All the testimony in the case up to this time shows, and one of the witnesses for the defendants stated, that lode had been abandoned because they could find nothing but float. We further object for the reasons above stated.

Which objections were overruled by the court; to which ruling the plaintiff, by its counsel, then and there duly excepted.

Also the location certificate of the Nisi Prius lode, signed by George E. Pease and Stephen H. Pease, dated February 2nd, 1878.

Objected to by plaintiff's counsel because under agreement of parties it was distinctly stated that ore was not discovered in that property until long after the patent, and under an agreement with the applicants for patent of the placer they took a bond for a deed when they struck mineral, and for the reasons last stated.

The COURT: The parties were sinking a shaft for a lode and made a certificate; that is admissible; all that took place in respect to that ground is admissible; all that occurred by parties working there, all that is admissible.

Mr. WOLCOTT: Subsequent to the issuance of the patent?

125 The COURT: Oh, no! while they were digging for mineral.

To which ruling of the court the plaintiff, by its counsel, then and there excepted.

Defendants' counsel offer in evidence location certificate of the Gnesen lode, signed by McCreigh and Donath, dated June, 1877.

Objected to by plaintiff's counsel for the same reasons above set forth; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Also the location certificate of the Oro La Plata lode, dated the 18th day of December, 1873, and the relocation certificate of the same lode, dated the 11th day of May, 1876.

Objected to by plaintiff's counsel for the same reasons above stated; which objection was overruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Also a bond for a deed to E. B. Hepburn and M. J. McNearny and Charles York, by Wells and Moyer, dated the 24th day of September, 1878, of the Leadville lode, which was admitted without objection.

Also a warranty deed, signed by Calvin Donaldson, James Donaldson, Elmer Deutro, and Adolph Donath, for the H. D. lode, to William H. Stevens and Levi Z. Leiter, on the 26th day of January, 1878.

Objected to by plaintiff's counsel; which objection was over-
126 ruled by the court; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Also a deed, dated the 14th day of October, 1878, from George Hayes to Stevens and Leiter of the undivided ½ of the William Reddick lode.

Defendants' counsel offer in evidence all the Crown Point and Pinnacle title papers, the patent to the claims being dated May 12th, 1884.

Mr. WOLCOTT: If they claim under the Crown Point and Pinnacle title we have no objection in the world; that is competent; but I understood at the commencement of this trial they disclaimed that title, but if they do claim under the title we have no objection to the introduction of these papers, and I apprehend it is competent for us to show or prove that this lode is not a lode to which the owners of the Crown Point and Pinnacle are entitled; they cannot disclaim and claim also; if they claim under those titles it is competent for us to show where the apex of this lode is.

Mr. THOMAS: We have no claim under any apex at all.

The COURT: They can take that position if they wish to.

Mr. WOLCOTT: Then we have no objection to the introduction of these papers if they claim under the Crown Point and Pinnacle title.

Mr. THOMAS: We offer a deed, dated the 29th day of April, 1879, by Thomas S. Wells and William Moyer to George E. Pease, Stephen H. Pease, and Charles York to that ground known as the Leadville lode in the Wells and Moyer placer.

127 Also a deed from Thomas S. Wells and William Moyer, dated the 7th day of June, 1879, to Burdell and Witherell to a piece of ground in the Wells and Moyer placer, which is known as the Gnesen lode.

Objected to by plaintiff's counsel for the reasons before stated; which objection was overruled by the court; to which ruling of the court the plaintiff, by his counsel, then and there excepted duly.

Mr. THOMAS: We offer a deed from the Iron Silver Mining Company to the Nisi Prius Consolidated Mining Company, dated on the 6th day of October, 1884, of the property that is in controversy in this case.

Which deed was admitted without objection.

Mr. THOMAS: I think that is the defendants' case, except we want to offer the maps and model in evidence.

Which were admitted without objection.

(Here follow photographs marked pp. 128, 129, 130, 131, 132, 133, 134, & 135.)

136 And thereupon the defendants rested their case.

And thereupon the plaintiff, to further maintain the issues herein on its behalf, gave in evidence in rebuttal as follows—that is to say:

WILLIAM B. PAGE, a witness recalled on the part of the plaintiff, gave evidence tending to show:

I was examined on behalf of the defendants. The maps and model were made under my direction. That (indicating) represents the apex of the lode. I have drawn the apex on the map to correspond with the model under your direction, Mr. Wolcott. I state this is a well-defined lode of ore in rock in place, having a top or apex. This is its top or apex (indicating southwest corner of Crown Point onto Rock and Dome). The dip of the lode is to the east.

Q. Is that or isn't that practically at right angles with the side lines of the Rock and Dome lodes?

Objected to by defendants' counsel because immaterial to the issues presented to the jury; which objection was sustained by the court.

Mr. WOLCOTT: If your honor please, the defendants, in their proof of their case at the outset, disclaimed in terms all claim under the top or apex of a lode. At the close of defendants' case their counsel introduced the title papers of the Crown Point and Pinnacle lodes, showing, and for the purpose of enabling this jury to deter-
137 mine, that they claim this ground in controversy by reason — their ownership of the Crown Point and Pinnacle lodes.

The COURT: They claim it as holding the Crown Point and Pinnacle lode, but not the top of it.

Mr. WOLCOTT: If your honor please, by reason of their ownership of the Crown Point and Pinnacle lodes. Now, the law, as your honor has laid it down in a hundred mining suits, has been that one cannot follow a body of mineral outside of the vertical side lines unless the body of mineral leaves the side lines upon the dip of the lode, and unless it leaves it enclosed between material which makes it a vein within the meaning of the law, and I apprehend there is no question as to the law. If one had not the top or apex of a vein within the side lines of their claim, then they have no right to follow it into other ground upon its dip or apex; their right to leave the territory depends, first, upon it being a lode; second, upon the ownership within their side lines of the top or apex. Our ownership of the Rock and Dome gives us this apex, but if we own it above & outside of the Crown Point and Pinnacle, our position is these people have no right to follow it outside of the side lines.

The COURT: The gentlemen can put in what evidence they may see proper. I don't know what position they are going to assume before the Supreme Court or here, because all features of the case are in issue; there is no question about the top or apex of a lode; it is not a subject in issue between you.

Mr. WOLCOTT: I don't know as I fully understand the Court. Can we not show those facts which would make it impossi-
138 ble, or make it unlaw- for them to leave their vertical side lines; as, for instance, they haven't the top or apex of the lode or that it was not a lode.

The COURT: That it is not a lode you can show, but you don't want anything about where the top and apex is or where it ends on its dip, and so on.

Mr. WOLCOTT: I am seeking to show this by this witness—where it ends upon its dip.

The COURT: I don't think that is material.

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

Q. Will you please mark upon that map the top or apex generally to see if it is connected?

Objected to by defendants' counsel for the reasons last above stated.

WITNESS: It is marked on that map.

Mr. WOLCTT: I want the map to show the top or apex or outcrop. I asked him to show it further over on the Rock and Dome.

The COURT: We don't care about that.

Mr. WOLCOTT: It has been testified by other witnesses where it comes out on the Rock and Dome.

The COURT: We are not going to try the question whether it is there or not.

To which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

139 THOMAS S. WELLS, a witness produced, sworn, and examined on the part of the plaintiff, gave testimony tending to show:

I reside now in Cañon City; lived formerly at Leadville; was at one time an owner in the Wells and Moyer placer. The early location of that placer goes back to 1860. I first went into California gulch in that year, when the great rush occurred to the gold fields, and commenced placer mining there. After I had been there a month or two I became interested in some washings located within the present boundaries of the Wells and Moyer placer, and have been working some portion of it every year until the year 1878, when I sold to Messrs. Stevens and Leiter. In the year 1860 I became interested in two claims about there (indicating on map), and from that time on I commenced acquiring more and more interests until I finally acquired the ground which is known as the Wells and Moyer placer. I didn't become the original locator of the ground at that time, but became interested by purchase from the parties who had located it and who had already worked it out in a rough manner, leaving a great portion of the gold. My working in 1860 was known as the third working from discovery in California gulch, and then it went along until some pay was found up here on the hillside on the south side of California gulch, and then I got some claims there also. About that time I went to work and brought in a ditch from the Evans gulch coming around here (indicating on model parallel with the gulch and some 500 feet south of and distant therefrom). That ditch is about 5½ miles long. We built it

from the Evans gulch down to a little gulch below here (indicating Stone location). The ditch was built in 1863 or 1864. Three years after that I built a ditch from Iowa gulch, some four
140 miles in length, until it comes to the top of the ridge here (indicating highest point of placer), and thence on down to here (indicating from thence in a northwesterly direction). The ditch was commenced in 1867 by myself and a man by the name of Hoover. Hoover had claims at the head of Georgia gulch, and it was to wash those as well as the claims I owned that we built the ditch. I recognize the photograph shown by plaintiff and purporting to be taken from the head of Georgia gulch as correctly showing that gulch looking west. I also recognize the model and the map as correctly showing the gulch. The photograph, marked "3," of the defendants shows the gulch the whole length of the photograph. From the time I first went to California gulch I kept acquiring little pieces of ground, small strips on the side of the gulch, and all the ground around there was staked right up to Leadville. There were three classes of claims there. One was a gulch claim in the bed of the gulch, a side claim immediately opposite that running back 100 feet, and then another class of claims called patch claims. The claims, until about 1866, were located in 100-foot patches. At that time our district laws were changed to encourage the location of claims 500 feet square, and I began to buy up and exchange other ground, and I finally came into possession of different tracts around in here (indicating on Wells and Moyer placer), and, after locating ground in Georgia gulch in company with Mr. Hoover in 1867, we built the Iowa ditch. After that Mr. Moyer and myself bought out a whole lot of claims there, a part of which they had worked out. Some of them were in Georgia gulch, and we cleaned up altogether, probably, a hundred claims. That was under the old law, before 1872. Those claims were afterwards consolidated into what is now known
141 as the Wells and Moyer placer. After working quite awhile in company with Mr. Moyer occasionally parties would come around and talk of our selling. Some two years prior to our selling to Mr. Stevens Mr. Moyer asked me what I would take for my interest. We had different talks with Mr. Stevens, especially Moyer, in regard to the selling of the ground. I gave Moyer a price for which he was to sell my interest. I had very little conversation with Mr. Stevens. Mr. Moyer made the trade, except my seeing afterwards Mr. Stevens and giving my consent to the conditions of the trade, as I understood it. Mr. Moyer and I were probably together at that time. We agreed to sell our ground there for a certain consideration, but in view of our poor title there—that is, the manner by which we had taken it up and were holding it, he said he wouldn't take it unless we would perfect the title, which we agreed to do on condition that he would pay us a certain sum of money, and also pay the expenses of perfecting the title. These conditions were carried out. I was paid seventeen hundred dollars for my share. The ground is now, and was in 1878, covered by what is generally termed gravel, wash or drift, over its entire extent. The wash and gravel varies, the lower part next to the gulch being

from five to six feet in depth, then increasing to twenty and getting as deep as a hundred feet and over in places as you go south from California gulch. As an observer, that ground in the spring of 1878 (meaning the Wells and Moyer placer) was a gold placer. The history of that Leadville claim is this, as near as I remember it: Mr. Pease, together with, I think, Mr. York, came down there and claimed we had surveyed a portion of his ground into our placer. The result of it was—as far as I was concerned, I didn't know the claim was
142 there—the proposition was made that if that was the case, after seeing our surveyor and finding out from our attorney the facts in the case, we would make some amicable adjustment. The date of the amicable adjustment and agreement was the 24th of September, 1878, some months after the entry of the placer. The agreement was followed up by a deed. No discovery had been made of any vein or lode within the boundaries of the ground which is now called the Leadville at the date of the agreement. At the time the survey was made there was considerable snow, and a portion of the Pennsylvania came within our survey, although it was ground which we had originally claimed as placer ground. We didn't know it until the complaint was made to us afterwards. We then agreed with the parties in interest that we would do what was proper by them. I think that jog was made up there expressly to escape a location that was supposed to exist. It failed to do it by about an acre and a half. We have carried out the agreement with Mr. Thompson on behalf of the Pennsylvania, or some person for him. No discovery of a vein had been made in the Pennsylvania at the time of the entry of our placer for patent. I knew nothing whatever in regard to the Nisi Prius Lode mining claim at the time the survey was made. I never gave a bond for a deed or a deed for the ground. In the early time, at the time the ground now included in the Wells and Moyer placer was originally recognized as placer ground, they had what they termed a district recorder. In California gulch there were three districts. Each district would meet once a year and elect a surveyor and stake-driver, as they were called, and a recorder. The records were so poorly kept, with the constant change of office—one man moving out and handed to another—& thus the records became
143 very imperfect, and through a long succession of such transactions as these our titles, as far as the paper title, had virtually become obliterated, except as a possessory right there, and hence it was necessary, there being at these early times—that is, eighteen years prior to the time we sold, no engineer or surveyor nearer than Denver, that we should stake off our claims, measuring them by a tape line, getting them as near as we could by that process. It was this sort of title that Stevens objected to, and that he required that we should make certain by compliance with later laws. When the patent was issued in March, 1879, the Oro La Plata, the Rock, and Dome claims were there, and, I think, either the Crown Point or Pinnacle; I don't know which. I don't think any other developments were made around there that showed a vein. The work on the Pennsylvania was not done within the boundaries

of the placer. There were no indications within the boundaries of this placer July, 1878, or March, 1879, of the existence of any vein within its boundaries. There was nothing within this placer at all, either development or outcrop, which showed the existence of any vein therein. I couldn't, from the workings and developments made without the placer, derive any knowledge that there was any vein within the placer. There was nothing that I saw in the workings at that time made in the Rock and Dome to indicate a vein in rock in place. There was nothing upon the dumps to indicate any such vein. I didn't see anything in the Oro La Plata indicating the existence of a vein in rock in place and nothing to indicate the continuity of a vein between the workings on the Rock, Dome, Pinnacle, and the Stone. I couldn't tell from what I saw there the dip of any vein of mineral in those workings. I have been
144 a placer miner for 18 to 20 years. The balance of the 27 years I have been lode mining. The rim rock which makes the channel or basin of California gulch crosses about the center of the placer. Georgia gulch has a rim rock also.

Cross-examination by Mr. WENZELL:

I first met Mr. Stevens in the year 1868. He first made his lode locations in that district in 1875 or 1876. I was not familiar with them except the portions lying immediately in the gulch. I have seen the iron location. I saw it first in the winter of 1878. The Bull's Eye about the same time and the Lime and Stone. I may have had conversations with Mr. Stevens about these locations; I don't remember any special conversations. Moyer and myself owned about 2,500 feet of placer running up the gulch. In 1860 a gulch claim was bounded by the gulch. We made the arrangement with Stevens in the winter or cold season of 1878; I think in the spring. Talk had been going on back and forth between Stevens and Moyer and myself, principally with my partner. It commenced in 1876, and finally resulted in this arrangement to buy us out. We had a verbal agreement to sell to him in the spring of 1878. Our price was agreed upon. I don't think Stevens said why he didn't apply for it himself. He said we should go on and apply for it to clean up those old titles so we could give him a deed for it. He didn't tell us what he wanted with the placer. By an old title I mean that I staked off claims here (indicating head of Georgia gulch) in view of building this ditch—500-foot claims for myself and friends and others interested with me. I paid money for the claims down in there. They were only bounded by blazed
145 trees 10 years before we applied for that patent. The size of the claims I bought there were 500 feet square. When they commenced cutting down the timber they cut down the blazed trees and destroyed the stakes. There was one large tree that had our mark on it for a long time after the patent was issued. It was situated over there near the Pennsylvania claim. I staked ground there in 1874 down in Georgia gulch, and in 1872, and then came the carbonate excitement, and they cleared off the timbers and destroyed our stakes and marks. We had to concentrate our water in

one place. We couldn't scatter it all over the surface and gather a crop off of it as you would in irrigation. The richest ground I ever worked was right up in there (indicating Eureka gulch). I have filed records of locations which I claimed as placer. In 1877 I filed several and several more on this lower ground between 1871 and 1873. There were quite a number of them. I think I filed more than three at Granite. I don't remember the names; they were 500 feet square. We had no numbers at that time. I don't remember locating them as Moyer number 1, 2, 3, and 4. I may have done so. I was especially successful in getting some good prospects here (indicating about center of placer). My locations were within the boundary of the placer. The men I bought from also had locations in there. The locations I mentioned take in the top of the hill and along Georgia gulch. I lived there since 1860. The Coon Valley claim lies immediately west of the placer, on north bank of Georgia gulch; am one of the owners of the Coon Valley claim. The shaft is down over 600 feet. A placer is usually gravel that contains particles of gold that can be washed out with water without the aid of machinery. Wash would be
146 the accumulation of wash material lodging in gulches, on benches or elsewhere, flats or basins, valleys, that has been collected and brought there by water. It is sometimes loose, broken-up material slid down from above. At other times it is accumulated by water. Bates made the survey in March, 1878. I don't think individually that I employed him. I am pretty sure I didn't pay him. I think I told Bates where to run the lines; I am not certain, but it is quite likely I did; I certainly must have done it. The Wells and Moyer placer, as it is surveyed now, embraces the ground embraced in our old claims, and our old claims embraced the ground now included within the Wells and Moyer placer. The ground was generally recognized as our ground by people who were residing there and knew us and knew the ground. I don't believe I had once a placer location on what is now known as the Rock and Dome. We had no lines until Bates made his survey; am generally acquainted with the carbonate veins around Leadville. I first saw carbonate ore in 1874, but didn't know what it was; it came from the La Plata. I never saw anything like it in California gulch above the Rock mine or on all my working on the placer above the Rock. I never sank any shafts myself that early. I own the Shamrock; it is situated near Leadville. I found nothing in the first shaft I sunk but porphyry and lime; I struck ore afterwards in running a drift. Mr. Arnold didn't build that ditch. Wood made arrangements to buy water from us to run down to his mines for domestic purposes or concentrating purposes, and he built it; it wasn't built for gold-washing purposes. I never saw Arnold upon the ground. The ditch we built was used for washing ground on that placer. That cut shaded dark was worked from there on up (pointing to the center of the placer).
The cut is 15 to 20 feet in width. We found gold in it
147 and the last clean-up I made there I got over twenty dollars.
We had short days and it was enough to pay good wages; we were only two or three days; we never extended the cut. I got

seventeen hundred dollars for my half interest in the placer. California gulch was not worked out as a placer at the time I sold to Stevens; some of it had not been worked at all; it was worked in 1878 by Moyer. Stevens was the owner of the property as early as 1878, provided he complied with our conditions; we relinquished our ownership at that time. Since the time Moyer and I were in partnership we worked it ten years. Moyer has the books, I think, but the best estimate I can make we divided in profits one season eight thousand dollars; the lowest division would probably be twelve or fifteen hundred dollars a piece. I don't remember whether I made affidavits in connection with the application for patent for the placer or not; I may have done so.

Redirect examination:

Have prospected the placer at twenty different points, especially where the lettering runs on the map. The Coon Valley shaft is just west of the placer; it went through five hundred feet of wash on the north bank of Georgia gulch. The Shamrock is situated on Carbonate hill, about a mile and a half west from the placer. I worked on it in the fall of 1878 and the spring of 1879. I have no interest whatever in the subject-matter of this litigation.

Recross-examination:

148 I prospected the placer by digging test-pits, and tested other old holes that had been dug there years before. I carried the dirt down the hill on my back to test it.

Plaintiff's counsel then read the deposition of WILLIAM MOYER, which tended to show:

My age is 42. At present, live in Starr city, Indiana; am a farmer and stock dealer; am one of the patentees of the Wells and Moyer placer; lived in Lake county, in the vicinity of Leadville, 11 years and a little over. I was a partner of Thomas S. Wells; was placer mining when in Lake county; made first survey of the Wells and Moyer placer the latter part of March, 1878. Up to that time had only local possessory titles. There were quite a number of these local possessory titles consolidated and comprised within the survey of the Wells and Moyer placer. These local titles I commenced procuring from 1867, and continued doing so until 1878, in the spring. Myself and Wells took out from that ground somewhere in the neighborhood of two hundred and fifty thousand dollars in gold, chiefly from California and Eureka gulches. I often searched for lodes, but never found one within the boundaries of the placer. I never knew of the existence of any vein or lode within the boundaries of the Wells and Moyer placer up to the date of the issuance of the patent. There were no adverses filed against our application for patent, and had any one claimed a lode within the boundaries I think adverses would have been filed. I knew the Rock and Dome claims in 1874. There were some slight developments
149 upon them in 1878, but couldn't tell from the developments the direction of the dip or the strike of any vein; was with

Stevens and Wood and Leiter a great deal about 1877 and 1878. They or either of them never claimed to me that they knew the strike or dip of any vein. I made the purchases of the mining rights that were afterwards consolidated in the Wells and Moyer placer for speculation and for mining purposes, but I didn't have any arrangement with Stevens and Wood or Stevens and Leiter to buy up these claims for them. My partner, Wells, and myself sold the Wells and Moyer placer to Stevens and Leiter. When I made the surveys of the placer I never claimed to any one that I was doing it for Stevens and Leiter or for Stevens and Wood, or Leiter or either of them.

Cross-examination by Mr. WENZELL:

I first went to California gulch in 1867. The claims in California gulch ran from 70 to 200 feet wide; knew Michael Norris and A. Y. Gorman; knew he had a hole in the ground, and what he called the A. Y., but never knew he had any lode. There were quite a number of side claims, which I purchased, which were five hundred feet square. I think Bates surveyed the placer; I assisted him, and I think a man by the name of Carter. I don't remember Deutro assisting him; didn't know of the Iron, the Bull's Eye, the Lime, or the 76 locations. I didn't know the Crown Point, the Pinnacle, the H. D., the Reddick, the Pennsylvania, or the Vermont; knew the La Plata and the 5.20; didn't know the Eldora, Charles Francis Meagher, the Gnesen, the Nisi Prius, or the Leadville; was in La Plata some time in June, 1878; saw some carbonate ore; knew shaft about 15 feet
150 deep. The shaft didn't show the dip or strike of the vein; was in the Rock or Dome in 1876; found some ore outcropping, I think, on the surface; couldn't tell, from what I saw, anything about the strike or dip of any vein; knew what was called the iron vein of ore or the carbonate vein, but only knew it in the Iron mine shaft; couldn't see it on the ground; didn't know it as far south as the Rock and Dome. I considered this as a vein at that time—'78. The consideration for the sale to Stevens and Leiter for the placer was not paid until we made our transfer. The transfer was made before the patent issued, but after the entry in the land office. We also sold them the Eldorado ditch, which crosses the placer. At the time Bates made the survey I hadn't received a cent of consideration. I never made any statement to Michael Norris or had any conversation with him about the Charles Francis Meagher claim. There was no such lode. I state most positively that I had no such conversation. In running the lines I knew the claims I owned, and I surrounded those claims myself; never gave a bond for a deed to the William Reddick or the Pennsylvania or the Nisi Prius; don't think I ever gave a bond for a deed to the Leadville. They may have claimed they had lodes, but I never saw any and nobody else ever did up to that time (the fall of 1878). There were a few fragments and seams in the porphyry in California gulch running in all directions, cleavages; I don't call them veins. We used to call "Rock Hill" "Placer Hill." A. Y. Gorman never claimed

that I had surveyed in his A. Y. lode. The A. Y. is not within the boundaries of the placer or any part of it; consider the top of Rock Hill placer diggings. There had been a number of shafts sunk there which struck gravel. My partner, Wells, had a ditch
151 which covers the top of Rock Hill; had worked myself for gold four or five hundred feet back from the gulch; think Wells conducted most of the business; first claimed the ground now known as the Wells and Moyer placer from the year 1867. As far as I recollect, the names of the other locators were used as an act of friendship and in order to comply with the laws when we made the consolidated location; am not a stockholder in the Iron Silver Mining Company or the Nisi Prius Company; am not interested in the result of this suit in any way; live about two hundred and forty miles from here, in Indiana, and expect to be paid my expenses for coming to Detroit to give this deposition and reasonable pay for my time in addition.

Plaintiff's counsel then read the deposition of WILLIAM H. STEVENS, which tended to show:

Sixty-seven years old; live in Wayne county, Michigan; lived 20 years in Colorado; have not lived there the last two or three years; went first to Leadville, Lake county, in 1865 and 1866, but began to spend most of my time there in 1873. I commenced there as a placer miner. In 1873 and 1874 I purchased, as the agent of the Oro Mining, Ditch, and Fluming Company, a large number of placer claims—perhaps 250 to 300 claims—gulch and bank claims. The gulch claims were 100 feet in the gulch and the bank claims were 500 feet square. We built a ditch 14 miles long for the purpose of conveying water to wash out the gold. I bought the Wells and Moyer placer from Thomas S. Wells and William Moyer. I think the price paid was four
152 thousand dollars. I think I purchased — in 1878. The record shows, I think, the chief bargaining was done with Weston, the attorney for Wells and Moyer. At the time I made the purchase I had no knowledge of the existence of any lead, lode, or ledge or vein within the boundaries of the Wells and Moyer placer; there were no indications upon the surface from which I could have derived such knowledge. I personally examined the ground with a view of determining whether any lode, vein, ledge, or lead existed within the boundaries, and I never found any. I never saw anybody at that time who said they had found any; never heard even of a claim that any vein, lead, or lode had been found within the surveyed boundary of the Wells and Moyer placer. I never knew definitely where the boundaries of the consolidated claims were until the final survey by order of the surveyor general of the State was made. I think the preliminary talk about the purchase occurred in 1877, in the fall before I left, but possibly not until my return to Lake county in the spring of 1878. I was not there in the winter. The location of the Rock was made in 1874, but the developments didn't show until 1878 that it was a defined lode. We couldn't ascertain from the developments up to that time

the strike or dip. In the summer or fall of 1878 sufficient developments were made to determine the position in which the mineral occurred. It was then a discussion among the best practical and scientific men of the country whether it was a contact vein or a true fissure vein; whether it crossed the formation or laid with it. In the fall of 1877 explorations had made up Nugget gulch a full half mile from where the first discovery of float ore was made upon the Rock and Dome, and at that time myself and my partner, Wood, and other mining men thought the vein had a direction of northeast and
153 southwest. In the latter part of 1878 it became to be generally conceded that it was a contact vein, having an apex or outcrop and a line of strike nearly due north and south, varying with the undulations of the surface of the country. At the time of closing the contract with Wells and Moyer for the purchase of this placer it was not known and it could not be known to me or to any one else, until developments were made, what was the line of strike or the dip of the lode in the rock. During the latter part of 1878 I became satisfied in my mind and formed a theory as to the position of the lode. The whole surface of the country about the Wells and Moyer placer is covered with a deep alluvial deposit, and it was utterly impossible for any man to know what existed underground, and there were no developments to show it. I formed my theory about it as most mining men do. There never was any outcrop or apex of any vein within the surface boundary lines of the Wells and Moyer placer, and there isn't any such shown or developed to-day. I draw a distinction between a vein or lode and a lode claim. Lode claims are located around Leadville, where the wash is hundreds of feet deep, upon ten-foot holes. A number of pits or holes have been sunk within the Wells and Moyer placer, which were represented to me at that time as being explorations made for the purpose of discovering gold to justify the expense of bringing water in a ditch onto that ground to wash the elevated portions of the placer. That was one of the strongest inducements for buying the claim, so as to own the water privileges for washing the gold. The conversation referred to in Baldwin's testimony must have been in 1878 or 1879 after the line of strike and dip of the lode were ascertained, and I may have then had some talk with Baldwin about taking up
154 placers back of the line of our outcrop, which was already located with lode claims, for the purpose of keeping off jumpers and preventing them from sinking onto the lode, the top or apex of which we owned. But this conversation, if it ever occurred, was after the Wells and Moyer claim was entered and sold to Stevens and Leiter. At that time the dip of the lode could not have been known by any living man. Baldwin's work for Stevens and Leiter was two miles away from this Wells and Moyer placer. I knew in 1877 of a claim called the Summit, at the west end of the Crown Point and Pinnacle, which was located by Wood and Stevens. A shaft or two was sunk, one to the depth of about sixty feet. No rock, in place, was ever cut in that shaft. It proved to be placer

ground. It showed colors of gold, and the lode location was abandoned because it was considered by Wood and Stevens as placer land, and no discovery of a lode had been made in the shaft. The Wood and Stevens claim that Baldwin speaks of is ¾ mile north and east of the Wells and Moyer placer, north and east and back of the Iron mine. That is the Stevens and Leiter placer that was located by William Borden and others for the purpose of keeping jumpers off from the dip of the vein, the top or apex of which occurred in the Iron, Bull's Eye, and Lime. It is that location which Baldwin undoubtedly had in his mind when he was trying to make it appear that the explorations on the Summit lode, a mile and a quarter to a mile and a half south of the Stevens and Leiter location were made to apply on the work to secure the entry of the Stevens and Leiter placer. That is where Baldwin is mistaken.

Cross-examination:

155 The first discovery of carbonates was made in gulch mining. It was called by old gulch miners heavy spar. They never knew what it was until Wood and Stevens told them. When I speak of Wood and Stevens, the Stevens I refer to is myself. Wood, at that time, was my partner. The discoveries were first made of ore in the gulch that had no identity with or to any lode or vein. It was float-ore scattered over considerable area of country. I never knew of any vein in place until 1878. We made quite a number of lode locations before, I think—first on the south side of California gulch, on what is called Rock Hill, west of what is now the Wells and Moyer placer, and upon what is now the Rock and Dome location. We made those locations because we traced the float-ore there. We afterwards found the apex of the vein on those locations. We found it on the Stone location long afterwards, perhaps not until 1879. We made all our locations as near as could be on what we supposed our developments to be, the top or apex of the lode. We guessed, in making the locations, the direction of the top or apex as near as we could from developments and from the contour of the country—the manner in which the country was scored. We attempted to trace the vein from Iron Hill onto the Rock. Our intention was to locate the apex, and we did succeed to a certain extent; but up north there on the Iron — see the mistake we made. The Iron location is made nearly due north and south, while the vein runs angling across it onto the Iron Hat, Oro, and the Codfish Balls. The outcrop also runs angling across the Rock and Dome, showing how little we knew about the true direction of the vein or its strike. Had we known the direction, the dip, and strike of that lode we should have been able to locate it accurately instead of having to locate three or
156 four claims when we could have covered it just as well with one if we had known how it laid. The Rock and Dome claims are older than the Crown Point and Pinnacle. The La Plata is older than the Stone. The explorations in 1878, in July, only these locations were simply pit-holes sunk down to the limestone, seldom touching the lode, on a contact between porphyry and lime.

At one point only, I think, on the Bull's Eye north of the placer was the vein cut with well-defined walls. Some of these workings were four or five feet in surface soil; others 20 to 25 feet; some 50 feet. We took out a great deal of float-ore from the hill, some of which we shipped. In July, 1878, we most decidedly didn't know the line of strike of that vein. We didn't know its dip. We didn't know that the Rock and Dome was the same vein as the Lime, Bull's Eye, Iron, and others. Had we done so, as I have said before, we should have been more successful in making our lode locations on the apex. On the Rock and Dome we did make excavations, three or four pit-holes, indicating, as we then supposed, the course of the vein, which we thought was southwest or northeast. On the strength of this we made excavations on Nugget gulch northeast of the placer to the extension of the vein we thought we had discovered in the Rock and Dome. The explorations were thrown away because our theory was erroneous. It must have been during the summer of 1878 that I first began to have reasons upon which I formed my theory. The line of the strike is not necessarily the line of outcrop. The line of strike is the true course of the lode. The line of outcrop may vary, and nearly always does, owing to the undulations of the country and the scoring of it. The true dip of a vein is at right angles to the strike.

First knew Crown Point and Pinnacle in 1877. In the
157 fall of 1878 I began to believe that the strike of the vein was north and south and the dip to the east; never heard of the Thomas Francis Meagher or the Gray Eagle claims. The Coon Valley claim is not within the placer. I don't believe Stevens and Leiter ever gave any bonds for — deeds to any portion of the Wells and Moyer placer; the records will show best. The arrangement with Wells and Moyer was a cash transaction, based upon their agreement to secure the title. We may have agreed that Stevens and Leiter should pay the expenses of getting the patent in addition to the purchase price to be paid Wells and Moyer; we probably did so. The purchase price was not paid to Wells and Moyer until after the land had been entered in the land office. I may have told Bates, and probably did, as I was on his bond as United States deputy surveyor, to be careful in making the surveys and to exclude all adverse interests. I undoubtedly told him this generally. I purchased the H. D. claim from Deutro and others; knew Barnard and Goris. I afterwards purchased another placer from Moyer called the Moyer placer. I said in my direct examination that I didn't know the course or the strike or the dip of the vein in the Rock and Dome at the time of closing the contract with Wells and Moyer, and I want to be understood that way. The H. D. claim was located back of the apex on the Stone. I bought it to avoid litigation and more for the sake of the machinery there was on it. The H. D. claim is excluded from the placer and is not within its boundaries. I didn't buy the H. D. claim until April the 30th, 1879, as shown by the abstract of title; talked with Leonhardy, at Riverside, in the spring of 1877, I think. I was then gulch mining and was taking some men up to Leadville for the purpose of gulch mining. I told
158 Mr. Leonhardy that the land was poor for gold purposes; it

would barely pay for honest work; that a party might make a little profit by honest, faithful work, which proved to be the fact. There is profit to-day in gold throughout that whole entire ground in that whole Sacramento Valley—Stray Horse gulch, Georgia gulch, and up California gulch. There is profit in working it for placer. I expected to furnish these men with lumber for the purpose of working up Oregon and Georgia gulches. I said I feared they wouldn't make wages and would be disappointed; that was all that was about the poverty of the district. I explained to him that the large quantity of carbonates of lead and iron we took out from our sluice-boxes annoyed and interfered with us owing to its great specific gravity; that it was carbonate of lead; that there was a large quantity in the gulch, and that it was easy to trace it there for a half a mile or a mile in length; that is the explanation I made to Mr. Leonhardy. He mistook it or intended to mistake my language. The spread out territory was the spread out placer around or near the mouth of California gulch, now Leadville. The lead we found in our sluice-boxes was in such quantities that it indicated it would be found and develop large quantities of lead, and that it might contain silver enough to yield a profit. I had shipped some at that time. I bought the Wells and Moyer placer because it was offered for sale, and I bought the ground and timber and improvements thereon, including sluice-boxes and developments. I bought it for placer purposes. I think I received from it in 1878 or 1879 $1,500 or $2,000, royalty resulting from leases. Stevens and Leiter may have paid Bates, and probably did, for surveying the placer.

159 Redirect examination:

I have frequently expressed myself and given lectures on the subject of geology, of which I have made a study from Virginia through the whole country. My friends in Leadville came to me and wanted my opinion as it was at the time, and I was always careful to say that what I said was a theory or presumption and was hypothetical entirely. Reason and common sense will show that no man could have known that there was a vein or lode within the boundaries of the Wells and Moyer placer up to the fall of 1878. After the contract was made with Wells — Moyer to purchase the placer in the spring of 1878 I considered the trade closed upon my compliance with the conditions to be fulfilled in the future, and Wells and Moyer so regarded it, and Moyer took a lease from me of the placer during the summer of 1878, to the best of my recollection. I am a stockholder in the company which owns the Wells and Moyer placer.

S. S. Robinson, a witness recalled on the part of the plaintiff, gave testimony tending to show:

First became acquainted with the Wells and Moyer placer in August, 1878; commenced mining in 1853, lode mining. When I first knew the ground of the Wells and Moyer placer, in August, 1878, the southern part was covered with thick timber except where

the roads had been cut through it. I went over it with a view to prospecting it, looking for lode locations. I didn't see any
160 indications of a lode or vein upon the ground. It was covered with gravel and wash. There was no outcrop there then, and I have never seen any since upon it, and I know every foot of the ground. The map marked Exhibit "A" shows all the workings that were upon the placer or upon the lode claims in March, 1879. There were no connections between the workings on the Stone, the A. Y., the Rock, and the Dome and the Pinnacle or the William Reddick in March, 1879, and from the developments mentioned it was impossible to tell, and I couldn't tell, the strike or dip of any lode or vein existing in them. The work in the northern part of the Rock was the only evidence of any settled ground.

Cross-examination:

Had known Mr. Stevens a long time when I went there. I didn't go to Leadville on purpose to take charge of the iron mine; took charge of it a month or so after I went there. I can't at this time detail any of my conversations with Mr. Stevens. He may have talked generally about the formation. At the time I first went over the placer I heard it was claimed as a placer claim. I was looking around in order to see if I could make a lode location for myself. I went over that ground before I knew it was located as a placer. From the examinations made in August, 1878, I most certainly didn't come to the conclusion that there was exposed a vein in those workings with a dip to the east. The lines of stratification were shown in the limestone; appeared to have a dip or inclination to the east. They were about 12 or 15 degrees to the east. I think I first came to a definite conclusion as to the dip and strike of that vein in
161 1879, say, in the summer. The work I did on the Rock in the spring disappointed and confused me more than ever. As a matter of fact, since that time the workings have been in an easterly direction; taken out large quantities of ore, and have disclosed the limestone and the porphyry above and below the vein.

L. S. Noble, recalled on the part of the plaintiff, gave testimony tending to show:

I found the ditches shown on that map upon the ground. They are so plainly marked that I have traced them a mile and a half or two miles. I don't know what they were used for; I found them there. They all had the appearance of being old. The top of the hill is covered with a very large quantity of wash, certainly over a hundred feet deep. The black shading on the map represents gold washings. The double waving blue line represents Georgia gulch. It is shown on the model by a depression. The photograph taken by me shows a flume crossing Georgia gulch. The flume appears to be higher in the middle than at either end, because there is considerable of a gulch there. The flume is crossing the gulch from bank to bank and is 18 or 20 feet higher than the bottom of the gulch in the center, high enough to drive a high wagon and team under it.

Cross-examination:

The ditch running westerly on that plat is now plain to be seen on the ground, notwithstanding the snow. It is a foot deep and two feet wide. It is old and filled up in places. It has been cleaned out within a year below the Weir shaft in order to carry
162 the water from that shaft. The Weir shaft was sunk with the idea of prospecting for a lode. That shaft is over 480 feet deep. The photograph was taken for the purpose of showing Georgia gulch. The flume is about 400 feet long. I didn't take photographs of the other side of the mountain, because I knew defendants had taken them. I have been a surveyor of the plaintiff for about a year and a half. At the lower end of the placer Georgia gulch is about 50 feet deep. I think the banks of California gulch are twice as steep as those of Georgia gulch.

CHAS. L. HALL, a witness called and sworn on the part of the plaintiff, gave testimony tending to show:

Have lived in Colorado since the spring of 1859; first knew California gulch in 1860; lived there in 1860 and 1861, and then moved to Park county and lived there until 1877; then moved back again to Leadville; have an interest in this litigation. I gulch mined in 1860 close to the Wells and Moyer placer. In those days all the ground now known as the Wells and Moyer placer was taken up as placer ground and occupied as such. All the depressions and gulches around that country were staked off. Lode mining was then unknown in that section. Since the Nisi Prius Company owned a portion of Wells and Moyer placer it has been working it for lode purposes. I have a lease on the ground somewhere about here, where we have sunk a shaft 200 feet through wash, gravel, and boulders; it is called the American shaft. We sunk in that shaft through a hundred feet of wash and boulders and struck lime; sank
163 through the lime and struck the porphyry; sank through the porphyry and struck quartzite, and drifting on quartzite we struck lime. We have made some 800 feet of development. When I speak of boulders I mean rock that has been rounded by the action of water. I am interested in another shaft there; it is a little northeast of the American shaft. We first went through 200 feet of wash and then 100 feet of lime; then 100 feet of porphyry. We then found some contact matter on top of — quartz, and about 15 feet to the east of the shaft in drifting we struck lime. We went in 90 feet to the east and found a fault about 40 or 50 feet high. I am interested in the Hall shaft; it is down about 252 feet. About 60 feet was through wash. Under the wash we struck a supposed body of mineral pitching at an angle of nearly 45 degrees; it was between porphry and lime. I did work on the Nisi Prius; it is not within the boundaries of the placer; it was south of it. There was a long tunnel run in there with a vertical wall and ore on the south of it. The tunnel was run nearly in Iowa gulch. There is a shaft on the Sequin just west of the placer from which they have shipped ore. There is the Great O'Sullivan and the Emmett. Those shafts are down very deep.

I never was in them. I was over the Wells and Moyer placer a great deal in 1878, and was in the Rock. From the work I saw in the Rock in 1878 I could tell nothing about the character or extent of the vein or its direction; just one mass of iron boulders, lime, and carbonate. I didn't know anything about the Pennsylvania at that time.

Cross-examination:

When the Nisi Prius Company was formed I knew there
164 were lawsuits. As far as I know, the Nisi Prius claim never threatened the Wells and Moyer with any litigation because of any outcrop of any vein situated upon the Nisi Prius. I don't know where any apex of that vein is, except in the Nisi Prius. In my opinion, the general pitch of the limestone is not to the southeast. My observation is that it is north of east, and that the whole pitch of the country is north of east. There are local irregularities in it. I am speaking now of the whole country around there into Park county. If it was all the same vein from Iron Hill over to Rock Hill it must be very crooked. Some of the mines are 500 feet lower than they are in other places. We started the shafts in which I am interested trying to find mineral. We had no outcrop to sink on, and we sunk 400 feet in one shaft.

GEORGE E. PEASE, a witness produced, called, and sworn on the part of the plaintiff, gave testimony tending to show:

I reside in Park county; am a lawyer by profession; have been engaged in mining in Leadville, and I am somewhat familiar with the workings and developments around there. The Nisi Prius when first located didn't run onto the placer. It has been relocated three different times. We ran a tunnel on the Nisi Prius and found a vein standing up nearly vertical pitching to the north and east. There were all sorts of boulders, lime, and iron, and some bunches of ore and a general mixture of material. We did a great deal of work there with no satisfactory results. Judge Marshall and I hired a
man by the name of Chicken Bill in 1877 to go prospecting with
165 us. We hired him for ten days and were to give him fifty dollars for the ten days, because he was a good prospector, and he was to have a third interest in anything we found. We had a written contract with him to that effect. We rode over the Wells and Moyer placer; it was all woods then. We found nothing, no outcrop of iron or lime or anything, to locate on, and we didn't locate. Soon after we located down south of the placer on the Nisi Prius some men, named Hepburn and McNearny, came over and went to digging on what they called their Magnitude claim. They sunk a shaft in the wash 120 feet deep on what is now the placer and abandoned it; they got nothing. The claim never was staked. They went 300 feet further east and started a shaft on that piece of territory now known as the Leadville. Hepburn wouldn't go any further, and work was virtually abandoned. Hepburn was putting up the money. Hepburn then sold his interest to me, and

I put up the money to go on with the work. I changed the name to the Leadville, and we sunk that shaft about 100 feet deep. There never was any mineral disclosed in the Leadville. There never was a pound of ore. McNearny was dissatisfied and wanted to quit. While we were sinking there we got an agreement from Wells and Moyer that in case we struck ore or found a vein they would deed us this ground. That agreement was made on the 24th day of September, 1878. They afterwards gave us a deed on the 9th day of April, 1879. York and McNearny both sold out. The Leadville never was located, and no stakes were put up until the 17th of November, 1879. I think I went into the Dome workings.

Cross-examination:

Mr. Lovell and I did the original work on the Nisi Prius
166 together. Lovell was the man I depended on. He reported to me he had found some iron and lime in an old tunnel that Long and Derry had run on their placer. The tunnel is run on what is now the Nisi Prius Lode claim, but not on the Wells and Moyer placer. We didn't continue the tunnel, but went to work further up the hill. In our workings we tried to keep on top of the limestone. The workings were run easterly. I bought out what was known as the Jake Long placer, which bounds the Wells and Moyer on the south, and named it the Pease placer. I never threatened to adverse the Wells and Moyer placer on account of the Nisi Prius lode. I afterwards obtained a deed for a portion of the Wells and Moyer placer, I think, from the Iron Company, the plaintiff in this suit. It was that portion of the placer which was included within the Nisi Prius location. I never threatened to adverse the placer. I never had to make that representation at all. Mr. Wells, when he owned it, told me he would fix it all right, and the Iron Silver Mining Company gave me a deed for it. I had no trouble. We never had any talk about any adverse claims whatever. The agreement with Wells and Moyer, McNearny, York, and Hepburn concerning what is now called the Leadville had this clause inserted: "Provided, That the party of the first part shall not be bound to make said conveyance unless the parties of the second part shall have discovered mineral in rock in place on or before the first day of July next within that portion of the said Wells and Moyer placer claim." When we got our deed from Mr. Wells we had not discovered ore or mineral in rock in place on the Leadville. Mr. Wells gave me the deed on the representation, on my part, that I had spent a thousand or two thousand dollars there and wanted to keep on work
167 and would like to have the ground so I could work on it.

WILLIAM JAMES, a witness produced, called, and sworn on the part of the plaintiff, gave testimony tending to show:

Have lived in Colorado 27 years; am interested in the subject-matter of litigation; first moved to Leadville in 1875; was in charge of the Oro Mining Ditch and Fluming Company's property under Mr. Stevens; was in the Rock workings in 1875; couldn't determine

from the workings the character of the vein, its dip or its course; was there again in 1878. There was a large, open cut at that time. I couldn't tell whether it was a vein or not, any more than a quarry of limestone; have done a great deal of placer mining; am familiar with the Wells and Moyer placer. It was covered with wash, gravel, and boulders rounded from the action of water. There are streaks through it representing the same characteristics as the gravel in the gulch. I looked for myself at an early day to see if I could make a location of a lode within the boundaries of what is now the Wells and Moyer placer. I couldn't find any indications of a vein there or any outcrop of one. I was looking around to see if I could make some money.

Cross-examination:

There is good placer ground on the top of Printer Boy Hill; was in through the Nisi Prius in 1881. There was something that looked like a vertical vein between lime and porphyry. I don't think that the consolidation of the Nisi Prius property and Wells
168 and Moyer placer was made for fear of any litigation. The Iron Silver Mining Company contributed an equal number of acres with ourselves, and we formed the Nisi Prius Company. The consolidation was made on equal terms.

Mr. WOLCOTT: I would like to make an offer to show that the ground in controversy is not within the Crown Point and Pinnacle claims, and to show further that the workings don't pass into the ground in controversy upon any lode or following any lode the top or apex of which is within the limits of the Crown Point and Pinnacle.

But the court rejected said offer; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

And thereupon the plaintiff rested its case.

Such was the tendency of all the testimony given upon the trial of said cause.

The foregoing was all the evidence introduced or offered to be introduced upon the trial of this cause.

169 And thereupon the plaintiff, by its counsel, expressly requested the court to charge and instruct the jury as follows:

"1. The question for your consideration arises under that part of section 2333 which the Supreme Court has defined in this case as follows: 'But in case where the applicant for the placer patent is not in possession of such lode or vein within the boundaries of his claim, but such a vein is known to exist and is not referred to or mentioned in the claim or patent, then the application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim.'"

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"2. Thomas S. Wells and William Moyer were the applicants for the placer patent in question, and their application to enter and patent the same was made on the 16th day of May, 1878. In their application and in their patent no lode or vein within the boundaries of their claim is mentioned or referred to as having been known to exist at that time. They applied for and obtained their patent, claiming that no lode or vein within the boundaries of their claim was known to exist, and the principal questions in this case are whether in fact the patentees, Wells and Moyer, or Mr. Stevens had knowledge of the existence of such lode or vein, and, if so, whether it is the same lode or vein from which plaintiff in this case,
170 now the owner of the placer claim, seeks to dispossess the defendants."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"3. The lode or vein which, if known to the applicants, Wells and Moyer, it became necessary for them to include in their application ought to be excluded from the possession thereof must have been—

"First. A lode or vein the top or apex of which outcropped at the surface or was known to exist at some point below the surface within the boundaries of their placer claim.

"Second. It must have been susceptible of location by its top or apex upon the surface of the ground of the placer claim.

"Third. It must have been a lode or vein known to them at the time of their application for the placer patent, to wit, May 16th, 1878."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"4. The statute uses the words 'Where a vein or lode * * * is known to exist within the boundaries of a placer claim.' By these words you are to understand such knowledge on the part of applicants or placer patentees of the existence of such lode or
171 vein as would have enabled them, had they so desired, to have made a valid lode location thereon within the boundaries of the placer, or to have made survey thereof so as to have purchased the same with 25 feet of surface ground on each side thereof within the placer at five dollars ($5) per acre."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"5. A valid lode can only be made after the discovery of the vein or lode upon which it is made."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"6. A vein or lode of the kind here spoken of can only be known within the boundaries of a placer claim in one of two ways: either it must visibly outcrop within such boundaries or such work and development must have been made within them as to have exposed a vein or lode below the surface of the placer."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

172 The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"7. The court instructs the jury that if they believe from the evidence that the vein which it is claimed by defendants was 'known to exist' prior to the date of the application for the Wells and Moyer placer has its apex or outcrop to the west of said placer and on lode locations outside of the placer boundaries and thence is one continuous vein, dipping into and under said placer, then the property and right of property in that vein belongs to the owners of the lode location upon which said apex or outcrop is found, provided such locations antedate the date of the inception of title to the Wells and Moyer placer; and only the owners of such locations can contest the right to such vein with the owners of the placer title, provided the end lines of their lode locations, when produced according to law, include that portion of the vein or lode which they claim and which lies within the patented boundaries of the placer. If you find as above and that defendants are not the owners of such a lode location, then the placer title must prevail and your verdict must be for plaintiffs."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"8. The court instructs the jury that the term 'these presents,' found in the reservation clause of the Wells and Moyer placer patent, refers to the date of the title in fee conveyed by the patent, which is the date that the application was made for the said patent, to wit, the 16th day of May, A. D. 1878."

173 But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"9. The jury is instructed that the discovery of a lode at a point on the public domain without the boundaries of a patented placer after the date of the placer patent does not, under the law, give the discoverer the right to extend a location based on such discovery over or within the boundaries of the patented placer, and by so doing he can acquire no right to any portion of such patented placer."

But the court refused to give said instruction; to which ruling of the court, the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"10. The jury is instructed that the surface of a lode claim is incident to the lode, and that in Lake county, Colorado, where the property in dispute in this action is situated, the discoverer of a lode is only entitled to locate such of the surface ground as may lie within 150 feet of each side of the center of his lode. As against another claimant of the portion of the surface, such discoverer must show not only prior location, but the fact that — apex of the lode discovered passes on its course through the contested portion of the claim."

But the court refused to give said instruction; to which
174 ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"11. The court instructs the jury that if you believe from the evidence that the lode which defendants have sought to prove and claim was 'known to exist' within the Wells and Moyer placer at the date of the patent for the same was 'known to exist' only by being exposed in workings situate on the lode claims without the boundaries of the patented placer, and that it has only been proved to dip into and 'exist' within the patented placer by workings and excavations made since the date of the patent for the placer, then and in that event such lode does not fall within the exception of said patent, which refers to lodes claimed or known to exist at the date of its issuance, and you must find for plaintiff unless defendants, who claim the right to work such lode within the patented boundaries of the Wells and Moyer placer, have shown as against the patentees of the placer and their grantees that they (the defendants) were the 'proprietors' of such lode before the date of the issuance of the placer patent by virtue of being the owners of a valid lode claim upon which the top or apex of such lode is found & the end lines of which, produced according to law, include that portion of such vein to which they, the defendants, claim title."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

175 The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"12. The jury is instructed that a valid location of a placer claim operates from its date as a grant from the United States, and the ground located is, as long as the location remains valid, no longer part of the public domain. A patent is the highest evidence of a valid location."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"13. The court instructs the jury that a location of a mining claim is not made by taking possession alone, but by making a discovery on the public domain, working on the ground, recording, and doing whatever else is required by the acts of Congress and the local laws and regulations."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"14. The court instructs the jury that the exceptions contained in the patent to the Wells and Moyer placer, in so far as the said exceptions relate to veins or lodes claimed or known to exist at the date of said payment or at the date of the application for said patent, are only inserted in said patent for the benefit of the United States, and that advantage of such exceptions can
176 only be taken by the United States."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly ex-excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"15. The court instructs the jury that the title conveyed by the patent to the Wells and Moyer placer, offered in evidence by the plaintiff, relates back to the date of the location of the Wells and Moyer placer in so far as it may be necessary to cut off intervening and all claimants other than the United States."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"16. The jury are instructed that the terms 'vein or lode' and 'vein or lode claims,' as used in section 2333 of the Revised Statutes of the United States, mean and refer to veins or lodes which have been discovered and have been developed and located and that have metes and bounds within the boundaries of a placer claim before

the date when the application was made for the placer patent; and, unless the jury find from the evidence that such a claim was 'known to exist' within the boundaries of the Wells and Moyer placer at the date when the application was made for the Wells and Moyer placer patent, no other lode comes within the reservation
177 clause in said patent which refers to lodes 'claimed or known to exist' at the date of its issuance; and, unless the jury find from the evidence that such a lode was discovered and located and is now owned by defendants upon that portion of said placer in controversy in this action, a verdict must be rendered for plaintiff."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"17. The jury are instructed that to enable parties to establish and prove a title or the right to possession to a load location within the exterior boundaries of a patented placer claim they must prove and show that there is found within the exterior boundaries of such lode location within the placer claim, the top, outcrop, or apex of a lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, or other valuable metals which was known to exist at the date of the application for the placer patent."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"18. The jury are instructed that an attempt to locate a lode claim within the exterior boundaries of a placer claim at any time after the date of the application for patent to the placer
178 claim gives no right or title to such lode claim. A lode claim so located is not reserved from the grant of the placer patent. This rule applies to all lode claims located at any time after the application for the placer patent or the making of the entry or the issuing of the patent."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"19. The court instructs the jury that defendants have introduced no proof whatever that plaintiff was, at the date of the issuance of the patent for the Wells and Moyer placer, in possession of a vein or lode within the boundaries of the placer application."

But the court refused to give the said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"20. The jury is instructed that the discovery of a lode outside of the patented boundaries of the Wells and Moyer placer raises no presumption in the law of the existence of a vein or lode within the boundaries of the placer."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

179 The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"21. The jury are instructed that the plaintiff has shown title in fee to the land in controversy in this action by a United States patent therefor and by deeds of conveyance from the patentees to the plaintiff and its grantors."

But the court refused to give the said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"22. The jury are instructed that the date of the inception of plaintiff's title in fee is the date when the application was made for the placer patent, which is shown by a certificate of the register and receiver of the United States land office at Leadville, Colorado, to be the 16th day of May, A. D. 1878."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"23. The court instructs the jury that the locator of a mining claim such as the Wells and Moyer placer has, after his location, which, by the issuance of a patent, is proved to have been valid, the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and that any entry made upon such location for the purpose of initiating an adverse
180 title to that of the locator is a trespass, and such title so initiated is absolutely and entirely void and of no effect. The successors in interest of the locator have all the rights and privileges of the locator."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"24. The court instructs the jury that the exceptions contained in the patent to the Wells and Moyer placer, in so far as the said

exceptions relate to veins and lodes claimed or known to exist at the date of such patent or the date or application for said patent, are so uncertain and vague as not to describe with the accuracy required by law what is intended to be excepted by them, and they are therefore void as exceptions."

But the court refused to give said instruction; to which ruling of the court plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"25. The jury is instructed that a placer claim need not necessarily contain gold in alluvial deposits, but that under the law any mineral land which is not known to contain veins of quartz or other rock in place is placer, and title to such land can only be acquired by compliance with the laws relating to the location of placer claims."

But the court refused to give said instruction; to which
181 ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"26. The jury is instructed that the definition of what constitutes a placer given by the statutes of the United States is: 'Claims usually called "'placers'" include all forms of deposits except veins of quartz or other rock in place.' The veins of quartz or other rock in place alluded to are veins known to exist at the date of the application for patent to the placer."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"27. The jury is instructed that though a small segment of the top or apex of a lode is shown within the Crown Point location it extends not with the length of the location, but across it, so as to convert the side lines of the claim into end lines and to limit the direction in which it may be pursued to the space enclosed by these lines. The place in controversy is not within the side lines of either defendants' Crown Point or Pinnacle claims, nor within the extension of those lines. The defendants have, therefore, failed to prove any title to the place in controversy by virtue of the possession of the apex of any vein."

But the court refused to give said instruction; to which
182 ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"28. The jury is instructed that under the evidence any speculative theory formed at the date of the issuance of the patent for the

Wells and Moyer placer from the fact that at that date discoveries of a vein or veins had been made outside the placer boundaries that such vein so discovered ran into the placer was and could only have been the merest surmise. Belief in such theories (no matter how correct they may be proved by subsequent development) is not under the law evidence of that knowledge of the existence of a vein required to bring such vein within the second exception of the patent."

But the court refused to give said instruction; to which ruling of the court the plaintiff, by its counsel, then and there duly excepted.

The plaintiff, by its counsel, further requested the court to charge and instruct the jury as follows:

"29. The jury is instructed that the veins or lodes mentioned in the second exception of the patent for the Wells and Moyer placer mean veins or lodes 'known to exist' within the boundaries of the placer claim at the date of the issuance of the patent; that the exception does not refer to veins or lodes parts of which may be found subsequent to such date dipping into the placer at greater or less depth beneath its surface."

But the court refused to give said instruction; to which
183 ruling of the court plaintiff, by its counsel, then and there duly excepted.

And thereupon the court did charge and instruct the jury on its own motion, the whole of the charge being in words as follows, to wit:

"Whether plaintiff has title to the lode in controversy" is the question in this case, defendant having failed to show any title whatever other than such as may arise from possession.

Plaintiff's title is derived from Thomas S. Wells and William Moyer under a patent issued to Wells and Moyer, dated March 11th, 1879, upon an entry made July 22nd, 1878.

In the act of Congress and in the statutes of the State relating to such matters a distinction is made between vein or lode locations and placer locations and the manner of acquiring title to them, which must be understood in order to come at the real matter in issue between the parties.

In these acts veins and lodes or placers are not sufficiently defined for the purposes of this suit, and we must look to other sources for such definitions. As to placer locations, authors of recognized authority are quite explicit, and it will only be necessary to read from several of them.

Von Cotta says (page 23): "It is well known that gold, platinum, tin ores, and many precious stones are very frequently found in loose aggregates on the surface of the earth, in which, undoubtedly, they were not formed, but were brought there by the destruction of other deposits. These deposits have been called surface deposits,
184 placers, or washings; this last because the metallic particles or gems are obtained from the bed by various manners of

washing, and also because a concentration takes place by means of a natural crushing and dressing."

"All surface deposits have been formed by the destruction of some other kind of deposit."

La Conte says (page 232): "If a mountain slope along which outcrop auriferous quartz veins be subjected to powerful erasion by water currents, then in the stream beds will be found gravel drifts, composed partly of the country rock and partly of the quartz-vein stone. Among the gravel will be found particles of gold washed out from the upper parts of the veins. By the sorting power of water the heavy gold particles are apt to accumulate mostly near the bed of the gravel deposit (bed rock). These gravel deposits are the placers. In these the gold particles, like the stone fragments, are always rounded and worn by attrition."

(Page 555:) "The placers of California, however, are of two kinds, viz., the ordinary or superficial placers and the deep placers. The superficial placers are gravel drifts in the present river beds. The deep placers are gravel drifts in old river beds. These old river beds, as already stated (pp. 233, 529), are in many cases covered up with lava. In some cases the general direction of the old bed coincides with that of the present river system, but more commonly the present river system cuts across the old river system. In all cases, however, it is evident that the old river gravels were formed before the lava flow, and the newer gravels after the lava flow. In all cases,
185 also, the present river system has cut down far below the old beds in this respect entirely different from the old river beds of the eastern portion of the continent."

Speaking of superficial deposits, Whitney says (page 34): "These comprise all deposits of the metals and their ores which lie loose upon the surface or intermingled with the superficial formations, the drift and the alluvial. They are made up of particles and rounded fragments which have originally formed a part of some bed or vein and from which they have been detatched by various causes similar to those which have produced the great masses of clay, sand, and gravel which almost everywhere cover the rocks in place. Such metalliferous deposits are usually called 'washings' or 'stream-works.'"

Such a deposit existing commonly in the alluvium of streams and along their courses and often on the sides or elevated plateaus of the mountains in the loose material of the surface are easily distinguished from a lode or vein, which is a body of ore or mineralized rock in the general mass of the mountain.

When they are associated with a lode or vein in the same territory the placer is on the surface of the rock which forms the matrix of the lode or vein. The bed rock of the placer becomes the dividing line between the two deposits, and they are distinguishable in elevation as in other characteristics already mentioned.

As to each form of deposit, provision is made in the act of Congress for acquiring title from the Government, but the quantity of land which may be taken in a placer location is much larger than that which may be acquired in a lode location, and the pro-

186 ceedings for acquiring title differ in some particulars, to which it will be necessary to refer in detail.

It is, however, provided in section 2333 of the Revised Statutes that in an application for patent for a placer claim, when a vein or lode is known to exist within the claim, the application shall be made "with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode."

And where "a vein or lode is known to exist within the boundaries of the placer claim an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but where the existence of a vein or lode in a placer claim is not known a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The effect of this section is to exclude from the operation and to exclude from the grant of a patent for a placer claim any vein or lode the existence of which was known to the patentee at the time of the application for the patent, so that such vein or lode remains the property of the Government or of any citizen who may have acquired title to it in the same manner and to the same extent as if the grant had not been made. In other words, as between the patentee of the placer and the Government or other claimant of the vein or lode, it is in the same situation as if the patent had not been issued.

187 In this instance the existence of the lode at the point in controversy under the placer seems to be denied by plaintiff's counsel, but there is nothing in the evidence to support that denial. That there is a body of ore with defined boundaries in the general mass of the mountian in that locality is sufficiently established, and the case turns upon the point whether its existence was known to Wells and Moyer or to Stevens at the date of the application for patent. It is shown in evidence that Wells and Moyer, in making the application for patent, were acting as the agents of Stevens and Leiter, their grantees, the latter having purchased from them before the application was made, and therefore it is sufficient, if it appear that the existence of the lode was known to Wells and Moyer or to Stevens or to all of them at and before the time of the application for patent. Was it known to them or any or all of them at that time; and, if known, how known? What means of knowledge must the parties have had to charge them with notice of the lode?

Counsel for plaintiff contend that they must have ascertained by actual exploration within the limits of the placer that the lode existed there, or that there must have been an outcropping of the lode within the limits of the placer which could be seen by all observers, but such a rule would be unreasonable and wholly defeat the intent of the statute. In this instance it seems to be unnecessary to declare what circumstances may be sufficient to affect a patentee with knowledge, as declared by the statute, for if, in any case, it appear that an application for a patent is made with intent to acquire title

to a lode or vein which may exist in the ground beneath the
188 surface of the placer, it is believed that a patent issued upon such application cannot operate to convey such lode or vein. That intention could be formed only upon investigation as to the character of the ground and the belief of the existence of a valuable lode therein, which would amount to knowledge under the statute. If we look to the circumstances developed in the evidence we shall find that they tend strongly to the conclusion that the application in this instance was of that character. Wells and Moyer were placer miners in California gulch and in Eureka gulch long before Mr. Stevens and his associates acquired title to the premises. Their operations had been confined to California gulch and to Eureka gulch and some slight explorations on the hillside. Upon the purchase by Mr. Stevens and his associates the claims were extended in a westerly and a southerly direction to a great distance and over territory which had not been before that time occupied for placer mining and which, apparently, contained no placer deposits. Mr. Stevens and his associates were in search of lode locations, silver-bearing lodes, and a metal which is not found in placer ground.

Von Cotta says (page 505): "Surface deposits from which silver is extracted are not known, nor do they probably exist." Why was this done? The intentions of Wells and Moyer and Stevens are said to have been expressed at the time. If they were so expressed did they state the truth? If not, what is the fact in relation to the matter—what was the intention of the parties in making this application and securing this patent?

If upon the evidence you say it was to acquire title to the lode or vein in controversy the patent will not operate to convey such title.

If, on the other hand, the application was made in good
189 faith, with intent to acquire the premises as placer ground only and without knowledge of the existence of any lode in the premises, the patent will operate to convey such title.

If the application had been limited to California and Eureka gulches, and some reasonable space adjacent thereto which it might be supposed contained such valuable deposits as had been worked out in the gulches, no question could arise in respect to the matter, but when the outlying territory beyond those gulches which contains nothing in the nature of a placer deposit, and is apparently valuable only for ores or minerals which may be found beneath the surface within the country rock in the form of veins or lodes, is embraced in such application, what shall be said as to the purpose of putting in such outlying parts?

The conduct of the parties, quite independently of any intention by them expressed, may be the subject of reasonable presumption and inference, and if it appear to you that the purpose was to secure such lodes or veins as might be found on the mountains within the limits of the placer claim such purpose cannot be effected in any such way.

And attempt to pervert the statute and take the lode in a manner not authorized by law cannot be upheld.

If you believe from the evidence that at the time Thomas S. Wells

and William Moyer applied for patent to and entered the Wells and Moyer placer claim they were doing so for the benefit and at the instance of William H. Stevens and Levi Z. Leiter, and by reason of agreement with said Stevens and Leiter to purchase the same, and that the said Stevens and Leiter paid all the expenses
190 attendant upon the location, patenting, and entry of said placer claim, receiving therefor a deed shortly after said entry was made, then you are instructed that the act of the said Stevens and Leiter and the knowledge of the said Wells and Moyer or either of them was the knowledge of the said Stevens and Leiter.

And you are further instructed that if you believe such an arrangement and agreement was made, then, even though said Wells and Moyer should have been ignorant of the existence of said lode or any claim of the existence thereof, yet, if the said Stevens knew the same to exist, neither he nor the plaintiff could in anywise shield themselves behind the lack of knowledge on the part of the said Wells or Moyer or either of them.

You are further instructed that the plaintiff must recover upon the strength of his own title and not upon the weakness of that of his adversary. Whether the defendants have any title or not to that part of the deposit of which they are in possession under the Wells and Moyer claim becomes immaterial unless the plaintiff can show some better title thereto, and if you believe from the evidence that the said Wells and Moyer or William H. Stevens knew before the date of their entry in the land office that the said vein or deposit underlay the said placer claim, then you are instructed that the same did not pass to them by the said patent, and they, having no title thereto, cannot complain because the defendants are in possession, since their trespass cannot be a trespass against a person having no title. In such case the lodes and veins known to exist when a patent is asked for are excluded from the ground as much as if they were described in clear terms. "It was not intended to remit
191 the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land and his placer mine and such lodes or veins or mineral that are within it as were unknown, but to such as were known to exist he gets by that patent no right whatever. The title remaining in his grantor, the United States, to this vein, the existence of which was known, the plaintiff has no such interest in it as authorizes it to disturb any one else in the peaceable possession and mining thereof. When it is once shown that the vein was known to exist at the time the title was acquired to the placer it is shown that the patentee acquired no title or interest in that vein by his patent. Whether the defendants, therefore, have any title or are mere trespassers is immaterial. It is certain that they are in possession, and that is a sufficient defense against one who has no title at all and never had any."

The land officers, who are merely agents of the law, had no au-

thority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface within the limits of the mining location as well as to the land beneath the surface.

The insertion of the word "claimed" in the second exception of the patent is unauthorized, and you must consider the section as if it read "known to exist" only.

If upon what is here stated, gentlemen, you find that the plaintiff has good title to this lode or vein your verdict should
192 be for it; otherwise you will find for the defendants.

The court, as above set forth, charged and instructed the jury on its own motion (among other things) as follows:

"Le Conte says (page 232): 'If a mountain slope along which outcrop auriferous quartz veins be subjected to powerful erosion by water currents, then in the stream beds will be found gravel drifts, composed partly of the country rock and partly of the quartz-vein stone. Among the gravel will be found particles of gold, washed out from the upper parts of the veins. By the sorting power of water the heavy gold particles are apt to accumulate mostly near the bed of the gravel deposit (bed rock). These gravel deposits are the placers. In these the gold particles, like the stone fragments, are always rounded and worn by attrition.' (Page 555): 'The placers of California, however, are of two kinds, viz., the ordinary or superficial placers and the deep placers. The superficial placers are gravel drifts in the present river beds. The deep placers are gravel drifts in old river beds. These old river beds, as already stated (pp. 233, 529), are in many cases covered up with lava. In some cases the general direction of the old bed coincides with that of the present river system, but more commonly the present river system cuts across the old river system. In all cases, however, it is evident that the old river gravels were formed before the lava flow and the newer gravels after the lava flow. In all cases also
193 the present river system has cut down far below the old beds, in this respect entirely different from the old river beds of the eastern portion of the continent."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"Speaking of superficial deposits, Whitney says (page 34): These comprise all deposits of metals and their ores which lie loose upon the surface or intermingled with the superficial formations, the drift, and the alluvial. They are made up of particles and rounded fragments which have originally formed a part of some bed or vein and from which they have been detached by various causes similar to those which have produced the great masses of clay, sand, and gravel which almost everywhere cover the rocks in

place. Some metalliferous deposits are usually called 'washings' or 'stream-works.'"

To the giving of which portion of the charge of the court plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"Such a deposit existing commonly in the alluvium of streams and along their courses, and often on the sides or elevated plateaus of the mountains, in the loose material of the surface are easily distinguished from a lode or vein, which is a body of ore or mineralized rock in the general mass of the mountain."

To the giving of which portion of the charge of the court plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its
194 own motion (among other things) as follows:

"When they are associated with a lode or vein in the same territory the placer is on the surface of the rock which forms the matrix of the lode or vein. The bed rock of the placer becomes the dividing line between the two deposits, and they are distinguishable in elevation as in other characteristics already mentioned."

To the giving of which portion of the charge of the court plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"As to each form of deposit provision is made in the act of Congress for acquiring title from the Government, but the quantity of land which may be taken in a placer location is much larger than that which may be acquired in a lode location, and the proceedings for acquiring title differ in some particulars, to which it will be necessary to refer in detail."

To the giving of which portion of the charge of the court plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"It is, however, provided in section 2333 of the Revised Statutes that in an application for patent for a placer claim, when a vein or lode is known to exist within the claim, the application shall be made with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provision of this chapter, including such vein or lode.

195 "And where a vein or lode is known to exist within the boundaries of the placer claim an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but where the existence of a vein or lode in a placer

claim is not known a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

"The effect of this section is to exclude from the operation and to exclude from the grant of a patent for a placer claim any vein or lode the existence of which was known to the patentee at the time of the application for the patent, so that such vein or lode remains the property of the Government or of any citizen who may have acquired title to it in the same manner and to the same extent as if the grant had not been made. In other words, as between the patentee of the placer and the Government or other claimant of the vein or lode, it is in the same situation as if the patent had not been issued."

To the giving of which portion of the charge of the court plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"In this instance the existence of a lode at the point in controversy under the placer seems to be denied by plaintiff's counsel, but there is nothing in the evidence to support that denial. That there is a body of ore with defined boundaries in the general
196 mass of the mountain in that locality is sufficiently established, and the case turns upon the point whether its existence was known to Wells and Moyer or to Stevens at the date of the application for patent."

To the giving of which portion of the charge of the court plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"It is shown in evidence that Wells and Moyer, in making the application for patent, were acting as the agents of Stevens and Leiter, their grantees, the latter having purchased from them before the application was made; and therefore it is sufficient if it appear that the existence of the lode was known to Wells and Moyer or to Stevens or to all of them at and before the time of the application for patent. Was it known to them or any or all of them at that time; and if known, how known? What means of knowledge must the parties have had to charge them with the notice of the lode?"

To the giving of which portion of the charge of the court plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"Counsel for plaintiff contend that they must have ascertained by actual exploration within the limits of the placer that the lode existed there, or that there must have been an outcropping of the lode within the limits of the placer which could be seen by all observers; but such rule would be unreasonable and wholly defeat the intent of the statute."

To the giving of which portion of the charge of the court
197 plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"In this instance it seems to be unnecessary to declare what circumstances may be sufficient to affect a patentee with knowledge as declared by the statutes; for, if in any case it appear that an application for a patent is made with intent to acquire title to a lode or vein which may exist in the ground beneath the surface of a placer, it is believed that a patent issued upon such application cannot operate to convey such lode or vein."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"That intention could be formed only upon investigation as to the character of the ground and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"If we look to the circumstances developed in the evidence we shall find that they tend strongly to the conclusion that the application in this instance was of that character. Wells and Moyer were placer miners in California gulch and in Eureka gulch long before Mr. Stevens and his associates acquired title to the premises. Their operations had been confined to California gulch and
198 to Eureka gulch and some slight explorations on the hillside. Upon the purchase by Mr. Stevens and his associates the claims were extended in a westerly and a southerly direction to a great distance and over territory which had not been before that time occupied for placer mining, and which apparently contained no placer deposits. Mr. Stevens and his associates were in search of lode locations, silver-bearing lodes, and a metal which is not found in placer ground."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"Von Cotta says (page 505): 'Surface deposits from which silver is extracted are not known, nor do they probably exist.'"

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"Why was this done? The intentions of Wells and Moyer and Stevens are said to have been expressed at the time. If they were so expressed, did they state the truth? If not, what is the fact in relation to the matter? What was the intention of the parties in making this application and securing this patent? If, upon the evidence, you say it was to acquire title to the lode or vein in controversy, the patent will not operate to convey such title. If, on the other hand, the application was made in good faith, with intent to acquire the premises as placer ground only and without knowledge of the existence of any lode in the premises, the patent will operate to convey such title."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its
199 own motion (among other things) as follows:

"If the application had been limited to California and Eureka gulches, and some reasonable space adjacent thereto which it might be supposed contained such valuable deposits as had been worked out in the gulches, no questions could arise in respect to the matter, but when the outlying territory beyond those gulches which contains nothing in the nature of a placer deposit, and is apparently valuable only for ores and minerals which may be found beneath the surface within the country rock in the form of veins or lodes, is embraced in such an application, what shall be said as to the purpose of putting in such outlying parts?"

To the giving of which portion of the charge of the court plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"The conduct of the parties, quite independently of any intention by them expressed, may be the subject of reasonable presumption and inference, and if it appear to you that the purpose was to secure such lodes or veins as might be found on the mountains within the limits of the placer claim such purpose cannot be effected in any such way.

"Any attempt to pervert the statute and take the lode in a manner not authorized by law cannot be upheld."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"If you believe from the evidence that at the time Thomas
200 S. Wells and William Moyer applied for patent to and entered the Wells & Moyer placer claim they were doing so for the benefit and at the instance of William H. Stevens and Levi Z.

Leiter and by reason of agreement with said Stevens and Leiter to purchase the same, and that the said Stevens and Leiter paid all the expenses attendant upon the location, patenting an entry of said placer claim, receiving therefor a deed shortly after said entry was made, then you are instructed that the act of the said Wells and Moyer was the act of the said Stevens and Leiter, and the knowledge of the said Wells and Moyer and either of them was the knowledge of the said Stevens and Leiter."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"And you are further instructed that if you believe such an arrangement and agreement was made, then, even though said Wells and Moyer should have been ignorant of the existence of said lode or any claim of the existence thereof, yet if the said Stevens knew the same to exist neither he nor the plaintiff could in anywise shield themselves behind the lack of knowledge on the part of the said Wells and Moyer or either of them."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"You are further instructed that the plaintiff must recover upon the strength of his own title and not upon the weakness of
201 that of his adversary. Whether the defendants have any title or not to that part of the deposit of which they are in possession under the Wells and Moyer placer claim becomes immaterial unless the plaintiff can show some better title thereto, and if you believe from the evidence that the said Wells and Moyer or William H. Stevens knew before the date of their entry in the land office that the said vein or deposit underlay the said placer claim, then you are instructed that the same did not pass to them by the said patent, and they, having no title thereto, cannot complain because the defendants are in possession, since their trespass cannot be a trespass against a person having no title. In such a case the lodes and veins known to exist when a patent is asked for are excluded from the ground as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land and his placer mine and such lodes or veins of mineral that are within it as were unknown, but to such as were known to exist he gets by that patent no right whatever."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

The court further charged and instructed the jury on its own motion (among other things) as follows:

"The title remaining in his grantor, the United States, to this vein, the existence of which was known, the plaintiff has no
202 such interest in it as authorizes it to disturb any one else in the peaceable possession and mining thereof. When it is once shown that the vein was known to exist at the time the title was acquired to the placer, it is shown that the patentee acquired no title or interest in that vein by his patent. Whether the defendants, therefore, have any title or are mere trespassers is immaterial. It is certain that they are in possession, and that is a sufficient defense against one who has no title at all and never had any."

To the giving of which portion of the charge of the court the plaintiff, by its counsel, then and there duly excepted.

And thereupon the plaintiff filed its motion for a new trial, which said motion is in words and figures following, to wit:

UNITED STATES OF AMERICA, *State of Colorado:*

In the Circuit Court of the United States for the District of Colorado.

THE IRON SILVER MINING COMPANY, Plaintiff,
vs.
JOSEPH REYNOLDS *et al.*, Defendants.

And now comes the plaintiff and moves the court to set aside the verdict and grant a new trial herein for the reasons
203 following, to wit:

1. The court erred in receiving and admitting evidence against the objection of the plaintiff.
2. The court erred in rejecting evidence offered by the plaintiff.
3. The court erred in its charge to the jury.
4. The court erred in refusing to instruct the jury as requested by the plaintiff.
5. The verdict is against law.
6. The verdict is against the evidence and unsupported by the same.

L. S. DIXON,
E. O. WOLCOTT,
FRANK W. OWERS,
Plaintiff's Attorneys.

But the court overruled said motion and gave judgment on the vertict of the jury for the defendants and against the plaintiff; to which ruling of the court in so overruling said motion and giving judgment as aforesaid the plaintiff, by its counsel, then and there duly excepted.

And forasmuch as the matters and things above set forth do not fully appear of record the said plaintiff tenders this its bill of
204 exceptions and prays that the same may be signed and sealed

by the judge of this court pursuant to the statute in such cases made and provided, which is done accordingly this 26th day of April, A. D. 1887.

(Signed) MOSES HALLETT, [SEAL.]
District Judge.

Have examined above, and all corrections suggested have been made; no further objection to same.

(Signed) PATTERSON & THOMAS,
For Def'ts.

(Endorsed:) 1524. Circuit court U. S. The Iron Silver M'g Co. *vs.* Joseph Reynolds *et al.* Bill of exceptions. Filed Apr. 26, 1887. (Signed) Edward F. Bishop, clerk.

And afterwards and on, to wit, the 25th day of May, A. D. 1887, came the said plaintiff, by L. S. Dixon, Esq., its attorney, and filed therein a certain stipulation.

And said stipulation is in the words and figures as follows, to wit:

205 *Stipulation.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court in and for said District.

THE IRON SILVER MINING COMPANY
vs.
JOSEPH REYNOLDS *et al.* } No. 1524.

It is agreed that at the end of the testimony in the bill of exceptions heretofore filed in this cause there may be inserted the following sentence: "Such was the tendency of all the testimony given upon the trial of said cause."

Dated at Denver this the 25th day of May, A. D. 1887.

(Signed) PATTERSON & THOMAS,
Att'ys for Def't's.
L. S. DIXON, *Att'y for Pl'ff.*

The clerk will insert in the transcript of the bill of exceptions the clause specified in the foregoing stipulation.

May 25, '87.

(Signed) MOSES HALLETT,
Dist. Judge.

(Endorsed:) 1524. United States circuit court, district of Colorado. Iron Silver Mining Co. *vs.* Joseph Reynolds *et al.* Stipula-
206 tion for amendment of bill of exceptions. Filed May 25, 1887. (Signed) Edward F. Bishop, clerk.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore had and entered of record in said court and in a certain cause lately in said court pending, wherein the Iron Silver Mining Company was plaintiff and Joseph Reynolds and J. D. Morrissey were defendants, as fully and completely as the same still remain on file and of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 27th day of May, A. D. 1887.

[Seal United States Circuit Court, District of Colorado.]

EDWARD F. BISHOP, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Endorsed on cover: Colorado C. C. U. S. No. 960. The Iron Silver Mining Company, plaintiff in error, *vs.* Joseph Reynolds and John D. Morrissey. Filed June 16, 1887.

In the Supreme Court

Of the United States.

THE IRON SILVER MINING COMPANY,
Plaintiff in Error,
vs.
JOSEPH REYNOLDS and J. D. MORRISSEY,
Defendants in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Statement.

This is the second appearance of this cause in this court, it being, with position of parties reversed, the same reported in 116 U. S., 687, but coming now upon questions mostly distinct from any then decided. The action is ejectment for possession of a small part of a tract of mining land, known as the Wells and Moyer placer, in Leadville, Colorado, which part, entered upon by the defendants, on or about the 1st day of May, 1884, is described in the complaint as "the northwest portion at and near the north and east line of" said tract (record, folio 7). The complaint describes the entire tract, 193.43 acres, by metes and bounds, as the same are described in the patent of the United States therefor, and alleges the ownership in fee simple and right of possession of the plaintiff, and the unlawful and wrongful entry by the defendants upon, and ouster and dispossession of the plaintiff from, the portion thereof above particularly mentioned.

The answer (fols. 11–14) contains three defenses:

First—Denial of the title and right of possession of the plaintiff, as alleged in the complaint.

Second—Ownership, by the defendants, of Crown Point and Pinnacle lode mining claims, adjoining the placer on the north, the veins of which, in their downward course, dip into and underneath the exterior lines of the placer, and that working and following such veins on their dip, the defendants have, as the owners thereof and not otherwise, entered upon the premises described in the complaint and ousted the plaintiff from the possession thereof.

Third—"That at the time of the survey, entry and patenting of the said Wells and Moyer placer claim, a *certain* lode, vein, or deposit of quartz, or other rock in place, carrying carbonates of lead and silver bearing ore, and of great value, *called the Pinnacle lode,* and a *certain* lode, vein or deposit, carrying like minerals of great value, were known and claimed to exist within the boundaries and underneath the surface of said placer claim, survey lot No. 281, and that the fact that such *a vein or veins* were claimed to exist and did exist within said premises, was *known to the patentees* of said claim at all times hereinbefore mentioned, and that, in the application for patent for said placer claim the *said vein or veins so known to exist*, were not included, and were, in the patent issued upon such application, expressly excluded therefrom."

Further allegations of this defense are to the effect that the patent of the placer, in terms, provided that the premises thereby conveyed might be entered by the proprietors of any *such* vein or lode, for the purpose of extracting and removing the ore therefrom, should the vein be found to penetrate, intersect, pass through, or dip into said premises, and that the defendant Reynolds was such proprietor of the Pinnacle and Crown Point lodes, the veins whereof were so known to exist, and to dip underneath the exterior surface lines of the placer, and that he, as such proprietor, and the defendant Morrissey, as his licensee, have entered upon, and followed said veins underneath and within the surface boundaries of the placer at the place described.

To the answer the plaintiff replied (fol. 15-19) traversing the three several defenses set up, and for a further replication, alleged: "That at all times heretofore charged in the answer of the said defendants, it has been and still is the owner, and seized in fee of, and in actual possession of, the Rock lode mining claim; and the Dome lode mining claim, which adjoin, immediately on the north side, the said alleged Pinnacle and Crown Point mining claims, and that within the exterior boundaries of the said Rock and Dome lode mining claims, there is a vein, lode, lead and

valuable mineral deposit of quartz, and other rock in place bearing silver and lead, and which has its top, apex and outcrop, or highest end, within the exterior boundary lines of the said Rock and Dome lode mining claims, and which said lode, vein, lead and valuable deposit, on its dip and downward course, enters into and underlies the land adjoining, a portion of which consists of ground covered by the said alleged Crown Point and Pinnacle lode mining claims." Then follows an averment of title in the plaintiff to the lode or premises in controversy, as part and parcel of the veins and mineral deposits outcropping upon the Rock and Dome, of which the plaintiff was the owner.

After the reversal of the former judgment by this court, and after the cause was remanded, the plaintiff, to obviate an objection to the proof of title in the plaintiff of the Rock and Dome lodes—sustained by the court below on the first trial, on the ground that such title should have been averred in the complaint,—seasonably moved the court for leave to amend the complaint by inserting therein the substance of the matters touching the Rock and Dome titles, and the plaintiff's ownership thereunder of the lode and premises in controversy, as stated and contained in the replication, and by striking the same from the replication. The motion so made was denied by the court, and the order made and entered thereon, nearly three months before the trial took place, appears on page 20 of the record.

Upon the trial the plaintiff (pp. 27, 28, 29,) gave evidence of its title to the premises in controversy from its inception, as follows:

1. Three location certificates of the Wells and Moyer placer made on the 23d of March, 1878.

2. Certificate showing application for patent May 16, 1878.

3. Certificate of entry issued July 22, 1878.

4. The patent from the United States, dated March 11, 1879, which contained the following conditions and stipulations:

"*First*—That the grant hereby made is restricted in its exterior limits to the boundaries of the said lot, No. 281, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits which may hereafter be discovered within said limits and which are not claimed or known to exist at the date hereof.

"*Second*—That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits be claimed or known to exist within the above

described premises at the date hereof, the same are expressly excepted and excluded from these presents.

"*Third*—That the premises hereby conveyed may be entered by the proprietors of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits for the purpose of extracting and removing the ore from such vein, lode or deposit, should the same or any part thereof be found to penetrate, intersect, pass through or dip into the mining ground or premises hereby granted."

5. Deeds of conveyance from Wells and Moyer, the placer patentees, to Stevens and Leiter, and from the latter to the plaintiff, the last bearing date in March, 1880.

The plaintiff next offered in evidence (p. 29) the patents of the Rock and Dome lodes and deeds conveying title thereto, to the plaintiff, for the purpose of tracing, within the end lines extended forward and downward according to law, the right to follow the vein out-cropping therein into the territory and premises in dispute and thus establishing title to such territory and premises in the plaintiff. The evidence so offered was rejected by the Court and exception duly taken by the plaintiff.

The same offer (pp. 71, 72) was substantially renewed after the defendants had been permitted to put in evidence their title to the Crown Point and Pinnacle, and after they had rested their case, but was again rejected and further exception taken by the plaintiff.

Upon the trial the defendants expressly disavowed any claim of right or title to the premises in controversy under the Crown Point and Pinnacle locations and patents, or that such premises were part or parcel of any vein out-cropping in the Crown Point or Pinnacle which they could lawfully pursue and hold or own under those patents. They not only offered no evidence showing or tending to show any right or title in or to the premises in dispute in that way, but, referring to the Crown Point and Pinnacle lodes (p. 70), said: "We have no claim under any apex at all." This was an abandonment of their second defense and so much of their third defense as is contained in the paragraphs numbered two and three. And the court having excluded the plaintiff's offer of proof of title under the Rock and Dome patents, the issues before the court and jury, in the case as tried, so far as title to the vein itself was concerned, were reduced to the single one of title in the plaintiff under the placer patent, which question in turn depended upon whether

the lode or vein, at the place in controversy, within the placer and into which the defendants had intruded, was *known to the placer patentees to exist* at the time they made application for and entered the placer, without including in such application an application for such vein or lode, as pleaded by the defendants in the first paragraph of their third defense, and as provided for by Sec. 2333 of the Revised Statutes. As alleged in the answer, the application for purchase and entry of the placer did not include an application for the vein or lode in controversy, or any vein or lode as known by the patentees to exist within the boundaries of the placer; and such knowledge on the part of the patentees was expressly denied in the replication. The chief question in the case as tried, therefore, was this one of knowledge on the part of the placer patentees, or whether the premises in dispute were a known vein or lode within the *second* exception of the patent.

Section 2333 under which the placer patent issued is as follows:

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such a vein or lode; and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The patent of the placer, which carried with it the title to the surface included within the lines of the location as well as the land beneath the surface (115 U. S. 406), subject only to its being shown that the ground in dispute was within some one of the exceptions contained in it, having with the subsequent conveyances been put in evidence, the plaintiff, after some oral testi-

mony (pp. 29–34) explanatory of a map and model and some photographs introduced showing the general features of the country at and surrounding the placer and the location of other adjacent mining claims, rested its case.

The defendants thereupon offered testimony, the object of which was to show that the ground in dispute was a contact vein between porphyry and lime within the boundaries of the placer, and that it was known to the patentees to exist at the time they made their application for and entry of the placer. In order that the nature, scope and effect of the testimony introduced by the defendants to establish the existence and knowledge of the vein within the boundaries of the placer may be easily and clearly understood, we have prepared and annexed to this brief, in form of an appendix, an abstract of the same as given by each witness, except the first witness examined, a summary of whose testimony, exhibiting as it does very fully and accurately the situation and characteristics of the vein, together with the mode of its discovery, first without, and afterwards within, the boundaries of the placer, is here given as part of our statement. The appendix also contains an abstract of the testimony for the plaintiff in rebuttal.

It was shown by the testimony of **Mr. Page,** a mining engineer and expert and the first and leading witness examined for defendant (pp. 34–41), that the point of discovery of the vein, whence, as matter of fact within his knowledge, he traced and identified it as running into or within the placer at the place in dispute, was in the shaft of the Pinnacle lode claim and outside of the boundaries of the placer. He gave no testimony tending to show knowledge of the existence of such vein, either within or without the boundaries of the placer, on the part of the patentees or of any one else at or before the time of the application for and entry of the placer. His testimony, entirely theoretical as to the existence of the vein within the placer elsewhere than at the place in dispute, was, aside from the evidence furnished by the workings of the defendants at that place, based wholly upon developments and discoveries made outside of the boundaries of the placer, and at distances varying from several hundred to some thousands of feet from such boundaries, and which developments and discoveries had been almost wholly made after the entry of the placer and issuance of the patent. To the admission of this testimony (folios 62–65) objections were taken and exceptions reserved by the plaintiff. Like objections and exceptions were taken and reserved elsewhere during the trial as shown by the record.

The same witness testified that there was wash to an average depth of about 200 feet over the entire placer underneath which and above the vein was the hanging wall of porphyry which the testimony of this and other witnesses showed varied from 100 to 500 feet in thickness. He further testified that the shaft of the Pinnacle reached the vein at a depth of 108 feet from the surface, and that following the vein as worked by the defendants from that point to the point where it entered the placer at the place in dispute it was found to be 335 feet below the surface, and that the vein as thus developed and shown had "an extension laterally as well as on its dip" into the placer. The distance from the Pinnacle shaft to the point where the defendants entered the placer, as shown by the maps, models and testimony, was about 1,000 feet or one-fifth of a mile. And again he said: "There is no out-crop of this vein upon the surface, and the vein does not come through the wash; there is 100 feet of wash over the out-crop. No man going over the surface of the ground on the Crown Point and Pinnacle could, without development, have any information that there was any lode beneath it."

His first examination of the discovery shaft of the Pinnacle was in 1883. He knew nothing of it before that time, nor did he know when the discovery was made, but it appeared from the testimony of another witness **(Hallock)** for the defendants, and the only one giving testimony directly upon the point (fol. 117), that the discovery was made in December, 1879, more than a year and one-half after application for and entry of the placer, and about ten months after the patent was issued. The time of discovery within the placer, being the time the defendants made entry into the premises in dispute, does not distinctly appear in testimony, but it was about the time laid in the complaint and not denied in the answer, namely, May 1st, 1884.

Mr. Page was also (fol. 66), under objection and exception by the plaintiff (afterwards renewed on examination of other witnesses), examined as to the character and value of the placer as placer ground, or carrying free gold in paying quantities in the wash covering its surface, and gave testimony tending to show that, excepting those portions lying along California and Eureka gulches, about one-tenth of the surface of the placer, the same was not valuable for placer purposes.

Save one witness **(Baldwin)**, a mining engineer who, in November, 1884, visited the workings of the defendants in the Crown Point and Pinnacle, passing through them into the premises in dispute and describing them and the vein and explaining

the manner of its discovery within the boundaries of the placer, in substance as described and explained by Mr. Page, the testimony of all the other witnesses for the defendants was directed to showing the existence, or indications of the existence, of a vein at places *without the boundaries of the placer* and distant from such boundaries as above stated, and to showing conversations had by the witnesses with Mr. Moyer, one of the placer patentees, and with William H. Stevens, all of which testimony was objected and excepted to by the plaintiff.

The testimony as to the discoveries or indications of a vein outside of the boundaries of the placer prior to the time of its entry was, as will be seen by examination, vague and unsatisfactory. As shown by the testimony, the developments at that time were slight, so slight, in fact (being chiefly indications of vein or contact matter found at the bottoms of ordinary mining shafts), that no more than three or four of the witnesses were able to speak of a dip to the east in the direction of the placer, whilst others, with the equal knowledge of facts, testified that no dip or pitch was shown. And as to the course or strike of the vein, all the witnesses were silent as to any indication by which it could have been surmised or known.

The conversations with Mr. Moyer were let in as admissions on his part that he was applying for and entering the placer for the purpose, after entry, of making conveyance to Mr. Stevens, or to Mr. Stevens and Mr. Leiter, in pursuance of a previous verbal contract between him and Mr. Stevens.

Mr. Stevens' conversations were introduced, not to show that he had any knowledge of the existence of any vein within the boundaries of the placer, for that no one pretended, but to show that there existed in his mind a theory, altogether speculative in its nature, that a lode or vein might be found within the placer, the title or possession of which would be secured by the placer entry and patent and by conveyance from the placer patentees.

No witness testified to knowledge on the part of Mr. Stevens or any one else of the existence of a vein within the placer, and it unequivocally appeared from all the testimony that such knowledge was at the time impossible. It took years of subsequent underground labor and drifting before the fact was or could have been known, and, when thus ascertained, it was of the existence of a vein more than three hundred feet beneath the surface of the placer.

Aside from the mental operations going on in the head of Mr.

Stevens, which resulted in his forming and expressing a theory upon the subject, and which all the witnesses testified was a mere "theory," "prediction," "thought," "belief" or "speculation" on his part, there was no testimony tending to show in theory even the existence of any lode or vein within the boundaries of the placer. No theory of the kind had been formed by Wells or Moyer, the placer patentees, nor was it entertained by any of the witnesses, except one or two who had conversed with Mr. Stevens, and were inclined to give credit to it. Neither Wells nor Moyer, the placer patentees, had formed any such theory, nor did they entertain or act upon any supposition or belief of the kind. Neither had the notion entered the heads of any of the witnesses, save as imbibed from conversations with Mr. Stevens. One or two witnesses were inclined to concur in Mr. Stevens' speculations, while they seemed to make little or no impression upon the minds of others. All understood that it was a matter of the merest conjecture on his part. Strike from the record the testimony relating to his conversations, in which, from varying motives, he attempted to prophesy what the future might bring forth, and there is absolutely nothing left upon which to base a claim of the existence of a *known* lode or vein within the boundaries of the placer, which was taken out of the operation of the patent by virtue of the exception contained in it.

And Mr. Stevens' motives for acquiring the surface ground, which invariably appear in connection with his statements of his theory, show that his object was not to obtain title to lodes or veins by means of a placer patent. He had located and owned several lode claims on grounds outside of the boundaries of the placer, upon what he thought was the top or apex of a vein which he surmised, on its dip, extended into the placer, and it was for the purpose of protecting his title and possession of the vein on its dip, in case it did enter the placer, and to avoid invasion of his rights and litigation and trouble in the future, that he sought to acquire title to the surface ground. Such was one motive, and, we submit, a perfectly lawful and proper one. On other occasions Mr. Stevens seems to have entered more largely into the field of prophecy, indulging in speculations as to the entire region of country in and about Leadville, when his purpose was to induce the building of a railroad into that place. We see no particular wrong in this, so long as no person was deceived by the character of his remarks, but all understood that he was speaking as a mere theorist, with no better or greater means of information than were possessed by all others. Surely we see nothing in it which could

justify the forfeiture of his right of property, or the right of property of any person or corporation claiming title through him.

For a brief history of the manner in which Wells and Moyer acquired possessory rights to the ground as placer, see appendix pp. 10 and 11, and Mr. Wells' testimony, p 72, record.

The testimony of these witnesses being closed, the defendants, under objection and exception by plaintiff, gave in evidence certain certificates of location and deeds and a bond, as shown at page — of the appendix, and rested their case, and thereafter follows a summary of the testimony for the plaintiff in rebuttal.

Errors.

Of errors numerously assigned we respectfully invite particular attention to the following:

I. The rejection of the plaintiff's offer of proof of title and right of possession of the premises in controversy under the Rock and Dome patents, and subsequent conveyances.

II. The admission, as tending to show knowledge of the existance of a vein within the boundaries of the placer at the time of entry, of evidence of workings and developments made therein after entry; of workings and developments without such boundaries, as well those made before as after entry; and of lode claims without such boundaries, both those made before and after the entry, as also those in which no discovery of a lode or vein within their limits had been made.

III. Admitting evidence of the character of the surface ground of the placer as not carrying throughout its extent auriferous gravel in quantity or quality, to be worked or washed with profit.

IV. Admitting the conversation of Mr. Stevens to show, not his knowledge of the existence of any vein or veins within the boundaries of the placer, but that he had formed a theory upon the subject as well as upon the general geological formation of the country.

V. Admitting conversations of Mr. Moyer to show that he had verbally agreed with Mr. Stevens to convey the placer to him or to him and Mr. Leiter after entry made.

VI. Refusing the plaintiff's request to instruct as follows:

(1.) "The question for your consideration arises under that part of Section 2333 which the Supreme Court has defined in this case as follows: 'But in case where the applicant for a placer patent is not in possession of such lode or vein within the boundaries of his claim, but such a vein is known to exist and is not referred to or mentioned in the claim or patent, then the application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim.'"

(2.) "Thomas S. Wells and William Moyer were the applicants for the placer patent in question, and their application to enter and patent the same was made on the 16th day of May, 1878. In their application and their patent no lode or vein within the boundaries of the placer is mentioned or referred to as having been known to exist at that time. They applied for and obtained their patent, claiming that no lode or vein within the boundaries of their claim was known to exist, and the principal questions in this case whether in fact the patentees, Wells and Moyer, or Mr. Stevens had *knowledge* of the existence of such lode or vein, and if so, whether it is the same lode or vein from which the plaintiff in this case, now the owner of the placer claim, seeks to dispossess the defendants."

(3.) "The lode or vein which, if known to the applicants, Wells and Moyer, it became necessary for them to include in their application, *or* to be excluded from the possession thereof, must have been—

"*First*—A lode or vein the top or apex of which out-cropped at the surface or was known to exist at some point below the surface within the boundaries of their placer claim.

"*Second*—It must have been susceptible of location by its top or apex upon the surface of the ground of the placer.

"*Third*—It must have been a lode or vein known to them at the time of their application for the placer, to wit, May 16, 1878."

(4.) "The statute uses the words 'Where a vein or lode * * * is known to exist within the boundaries of a placer.' By these words you are to understand such knowledge on the part of the applicants or placer patentees of the existence of such lode or vein as would have enabled them, had they so desired, to have made a valid lode location thereon within the boundaries of the placer, or to have made survey thereof so as to have purchased the same with twenty-five feet of surface-ground on each side thereof at five dollars per acre."

(5.) "A valid lode location can only be made after the discovery of the vein or lode upon which it is made."

(6.) "A vein or lode of the kind here spoken of can only be known within the boundaries of a placer claim in one of two ways; either it must visibly out-crop within such boundaries, or such work and development must have been made within as to have exposed a vein or lode below the surface of the placer."

(7.) "The jury are instructed that the terms 'vein or lode' and 'vein or lode claims,' as used in section 2333 of the Revised Statutes of the United States, mean and refer to veins or lodes which have been discovered and have been developed and located, and that have metes and bounds, within the boundaries of a placer claim, before the date when application was made for placer patent; and unless the jury find that such a claim was 'known to exist' within the boundaries of the Wells and Moyer placer at the date when the application was made for the Wells and Moyer placer patent, no other lode comes within the reservation clause in said patent which refers to lodes 'claimed or known to exist' at the date of its issuance; and, unless the jury find from the evidence that such a lode was discovered and located and is now owned by the defendants upon that portion of the placer in controversy in this action, a verdict must be rendered for plaintiff."

(8.) "The jury are instructed that the date of the inception of plaintiff's title in fee is the date when application was made for the placer patent, which is shown by a certificate of the register and receiver of the United States land office at Leadville, Colorado, to be the 16th day of May, A. D. 1878."

VII. Charging the jury in several particulars as follows:

(1.) "As to each form of deposit provision is made in the act of Congress for acquiring title from the government, *but the quantity of land which may be taken in a placer location is much larger than that which may be acquired in a lode location*, and the proceedings for acquiring title differ in some particulars, to which it will *not* be necessary to refer in detail."

(2.) "In this instance the existence of a lode or vein at the point in controversy under the placer seems to be denied by plaintiff's counsel, but there is nothing in the evidence to support the denial. That there is a body of ore with defined boundaries in the general mass of the mountain in the locality is sufficiently established, and the case turns upon the point whether

its existence was known to Wells and Moyer or to Stevens at the date of the application for patent."

(3.) "It is shown in the evidence that Wells and Moyer, in making the application for patent, were acting as the agents of Stevens and Leiter, their grantees, the latter having purchased from them before the application was made; and therefore it is sufficient if it appear that the existence of the lode was known to Wells and Moyer or to Stevens or to all of them at and before the time of the application for patent. Was it known to them or any or all of them at that time? And if known, how known? What means of knowledge must the parties have had to charge them with notice of the lode?"

(4.) "Counsel for plaintiff contend that they must have ascertained by actual exploration within the limits of the placer, that the lode existed there, or that there must have been an outcropping of the lode within the limits of the placer which could be seen by all observers; but such a rule would be unreasonable and wholly defeat the intent of the statute."

(5.) "In this instance it seems unnecessary to declare what circumstances may be sufficient to affect a patentee with knowledge as declared by the statutes; for, if in any case it appear that an application for a patent is made with *intent* to acquire title to a lode or vein which *may* exist in the ground beneath the surface of a placer, it is believed a patent issued upon such application cannot operate to convey such lode or vein."

(6.) "That intention could only be formed upon investigation as to the character of the ground and the *belief* as to the existence of a valuable lode therein, which would *amount to knowledge* under the statute."

(7.) "The intentions of Wells and Moyer and Stevens are said to have been expressed at the time. If they were so expressed, did they state the truth? If not, what is the fact in relation to the matter? What was the intention of the parties in making this application and securing this patent? If you say it was to acquire title to the lode or vein in controversy, the patent will not operate to convey such title. If on the other hand, the application was made in good faith, with *intent to acquire the premises as placer ground only* and without knowledge of the existence of any lode in the premises, the patent will operate to convey such title."

(8.) "The conduct of the parties, quite independently of any

intention by them expressed, may be the subject of reasonable presumption and inference, and if it appear to you that the purpose was to secure such lodes or veins as *might be found* on the mountains, within the limits of the placer claim, such purpose cannot be effected in any such way. Any attempt to pervert the statute and take the lode, in a manner not authorized by law, cannot be upheld."

9.) "You are further instructed that the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary. Whether defendants have any title or not to that part of the deposit, of which they are in possession under the Wells and Moyer placer claim, becomes immaterial, unless the plaintiff can show some better title thereto, and if you believe, from the evidence, that the said Wells and Moyer, or William H. Stevens, knew before the date of their entry in the land office that the said vein or deposit underlay the said placer claim, then you are instructed that the same did not pass to them by the said patent, and they, having no title thereto, cannot complain, because the defendants are in possession, since their trespass cannot be a trespass against a person having no title."

VIII. Overruling the plaintiff's motion for a new trial.

POINTS AND ARGUMENT.

I.

The evidence of the plaintiff's title and right of possession of the premises in dispute, under the Rock and Dome patents, should have been received. What objection can exist to the plaintiff in ejectment, having two titles or two sources of title, proving both? We can conceive of none. It was decided by the Court of Appeals of New York, in

Enders v. *Sternbergh*, 2 Abb., Ct. App., Dec. 31,

that he could do so, and we know of no rule or decision, nor can we perceive any reason to the contrary. It being understood that the court below, on the first trial of this cause, excluded this evidence on the ground that the Rock and Dome title was set up in the replication instead of the complaint, a motion was made to amend by transposing that part of the replication to the complaint, with the result shown by the record. The motion was denied, and to the decision, not being reviewable on error, no ex-

ception was taken. The motion was made to obviate such objection, and not because it was deemed essential to let in proof of that title. The action was to recover possession of a small part, particularly described, of 193.43 acres of land, of which the complaint alleged the plaintiff was the owner, and which was "described by metes and bounds in the United States patent issued therefor, as follows:" and then followed the description of the entire tract as contained in the patent. The patent referred to did not issue to the plaintiff, but to strangers to the suit, and the complaint did not aver title in the plaintiff under it. No source or chain of title in the plaintiff was alleged, and the reference in the complaint to the patent was as matter of description of the larger tract of land, from a particular part of which the plaintiff had been ousted by the defendants. The averment of the complaint was the general one required by the Code, that the plaintiff "claimed an estate of inheritance in fee-simple in and to said premises," but with no reference to the source of title or the manner in which it was acquired. The plaintiff was not, therefore, limited in its proof of title by any allegation in the complaint. It was not restricted in such proof under the patent, because the patent was not so pleaded. It might have disregarded the patent as its source of title, and proceeded directly to proof of title in some other way, as for example, under the Rock and Dome patents. Or, being unrestricted by averments in the complaint. it might make proof of title from both sources, which we insist should have been allowed. If the plaintiff in ejectment should, for convenience or accuracy of description, aver that he was the owner of a tract of land described so and so, in a deed from John Doe to Richard Roe, it clearly would not compel him to prove title through that deed, or cut him off from proof of any other valid title. And the fact that the plaintiff in a subsequent pleading had averred title under the Rock and Dome patents, did not vary the question. If anything, it rendered proof of title from that source all the more admissible, for the reason that it apprised the defendants that such title would be relied upon, a thing that the rules of pleading in the action of ejectment do not require. The defendants were not and could not have been taken by surprise, and, if justice between parties is an end to be subserved in a law-suit, we respectfully submit that the proof should have been received.

II.

The evidence to the several matters embraced in assignment II. was inadmissible for reasons quite apparent. The chief ground

of objection is that it had no tendency to prove *knowledge* of the existence of any lode or vein within the boundaries of the placer at the time of its entry, which was the vital and only real question in the case. Proof of knowledge of the existence of a vein 300 feet beneath the surface, acquired by work done and developments made in 1884, has no tendency to show knowledge of the existence of such vein in 1878. Proof that a vein is known to exist in White Acre is not evidence to show that one exists or is known to exist in Black Acre. Proof of the discovery and location of lodes upon one tract of land is without effect to prove the existence or knowledge of the existence of lodes within another tract of land; and *a fortiori*, proof of the mere location or surface marking of a lode claim, with no discovery of a lode, is inadmissible for such purpose. The principles upon which these propositions rest, governing the admissibility of testimony in actions at law, are elementary and familiar. They apply with unbroken force here where it was manifest upon the trial—a point not questioned or questionable—that the ultimate fact to be establsihed was one which, in the nature of things, did not and could not exist. Knowledge of the existence of the lode within the placer was plainly impossible, and to receive testimony, in the vain attempt to show knowledge, was not only idle but obviously inconsistent and unreasonable. Whether there might exist outside developments and workings uncovering and disclosing a lode situated and dipping into the placer as this one is described, which would establish knowledge of its existence within the placer, it is unnecessary here to discuss. It may be conceded that the discoverer, working and developing a vein up to the line of the placer or within a few feet of the line, with all its physical characteristics well known, might not pause in his work and make entry of the placer claim as in ignorance of the lode existing within it. But no such question is here presented. In the first place the camp, as it respected lode or silver mining, was a new one, with a geological formation hitherto unfamiliar and unknown. In the next, there had been very slight, almost no developments in the neighborhood or upon the vein, the apex of which was supposed to have been discovered at distances varying from several hundred to several thousand feet from the boundaries of the placer, and of the nature, situation and characteristics of which so little was known that but very few witnesses could venture an opinion as to its dip, and none could speak of its course or strike, whilst nothing could be said of its continuance or strength Such was the condition of affairs at the time of the entry of the

placer, and to say that evidence of facts like these may be received from which to infer knowledge of the existence of a lode within the placer is to go wholly into the regions of fancy for such purpose, as well as to ignore the lessons taught by experience in every mining camp in the country. The great labor and immense sums everywhere expended, in reliance upon indications of this kind, but resulting only in disappointment in thousands of instances, sufficiently attest the fallaciousness of theories among mining people, the deceptive nature of that faith, which to them may be "the substance of things hoped for," but is not "the evidence of things not seen." To say that such indications upon which miners are prone to form theories or indulge in expectations or hopes are any evidence of knowledge on their part of what may afterwards be found hidden far away in the bowels of the earth, is, we submit, most unfounded and unreasonable. And the fact that the hundredth man, guessing on the hundredth occasion, may have happened, as subsequently proven, to guess right, no more justifies the inference of knowledge on his part than in the ninety and nine instances where it turned out that he guessed wrong. So great and numerous have been the violent disturbing causes in geological formations, that irregularties constitute the rule, not the exception, in almost every mining camp.

III.

The character of the placer as carrying or not carrying free gold in paying quantities in the wash covering its surface was a matter quite foreign to any question at issue in the cause. It was irrelevant to the question of knowledge on the part of the placer patentees or Mr. Stevens of the existence of a lode within the boundaries of the placer, tending neither to prove or disprove such knowledge;—a fact which, if it had existed, was capable of being proved by evidence of a direct and satisfactory kind, without resort to vague and ambiguous inferences drawn from negative testimony as to the qualities or value of the ground for placer purposes. It was testimony going to a collateral attack upon the validity of the patent as having been improperly or unlawfully obtained, and not to showing that the lode in question was excepted from the operation of the patent because its existence within the placer was known to the patentees before or at the time of their application and entry.

IV.

The conversations of Mr. Stevens should have been excluded because they had no tendency to show and were not introduced for the purpose of showing knowledge on his part of the existence of a lode within the limits of the placer. They were introduced for the purpose of showing a mere theory on his part, formed upon the then slight developments and most superficial knowledge of the geological features of the surrounding country. They were utterly without significance as evidences of knowledge and tended only to confusion in the minds of the jury upon that important question.

Again, they were inadmissible because not within the issues formed by the pleadings. No foundation was laid in the pleadings for the introduction of any evidence with respect to Mr. Stevens' supposed knowledge of a lode or vein within the boundaries of the placer. The answer of the defendants was that the vein was known to the patentees of the placer, Wells and Moyer, and that was the only issue. It contained no allusion to Mr. Stevens—no statement that he was in any manner concerned in the entry. And abandoning the issue as to knowledge on the part of the patentees, and without proving or attempting to prove that they or either of them had so much as a theory, suspicion or belief on the subject of the existence of lodes or veins within the placer, the defendants, against the objection of the plaintiff, were permitted so to abandon and ignore the real and only issue and go directly into evidence of Mr. Stevens' sayings for the purpose of showing his theory, without which there would not have been so much as a theory before the court and jury that there might thereafter be found a lode or vein within the boundaries of the placer. For this reason, also, it is obvious that the testimony as to his conversations should not have been received.

V.

And for the same reason last assigned for excluding the conversations of Mr. Stevens, those of Mr. Moyer should have been excluded. Without proper allegations in the answer, the facts intended to be shown by the conversations, and which constituted the gist of the defense, were clearly inadmissible. There was no allegation that the placer entry was made by Moyer or by Wells and Moyer for the use or benefit of Mr. Stevens, or of Mr. Stevens and Mr. Leiter, nor that Moyer was acting as the agent of Stevens or of Stevens and Leiter in the premises.

Again, upon the facts claimed, Mr. Moyer was not the agent of Mr. Stevens in making the survey and entry of the placer so as to bind Stevens by his declarations, such being the ground on which the declarations were admitted by the court. If A. verbally, or otherwise, agrees with B. that he will purchase a tract of land from C., and afterwards convey it to B. for a consideration named, A., in his negotiation with C. for the purchase, does not become the agent of B., but is acting for himself as the principal in that transaction. He is in no sense the agent of B., so that his declarations or admissions made to third persons can become primary or independent evidence as against B. His declarations or admissions so made are at best but mere hearsay as to the matter declared or admitted, save that under proper circumstances they may be used against himself. The declarations of a party claiming to act as agent, made to third persons, are not admissible against his alleged principal to prove the fact of agency, which was the purpose or one of the purposes for which the declarations in question were received. The rule is that the agency must be first shown by direct evidence, sufficient for the consideration of the jury, after which the declarations of the agent, as part of the *res gestæ*, may be received—a rule which was wholly disregarded on the trial, since no evidence of the so-called agency of Mr. Moyer—nothing save his alleged declarations made to others in the absence of Mr. Stevens, was offered or shown by the defendants.

VI.

We come now to the requests to instruct refused, which, together with the opposite instructions given, present by far the most important questions in the case—questions which, we trust, will not fail to receive the consideration and determination of the court. They involve chiefly, indeed may be said to turn wholly upon the meaning to be attached to the words "*known to exist*," as used in section 2333 above quoted. The inquiry is whether the statute means what it says,—knowledge of the existence of a lode or vein within the boundaries of the placer, or whether it means something other or different? Whether, when there are no circumstances which can be regarded as equivalent to knowledge or from which it can be inferred, where knowledge is plainly impossible, or, more broadly, whether in any other state of case, a mere theory, hope, expectation or belief on the part of the patentee or any one else, that a vein or lode may exist or be found to exist within the placer, can be said to constitute a

known existence thereof, which shall operate as an exception under the statute, or in the patent issued in pursuance of it? And whether an intent on the part of the patentee, possessed of no knowledge, to acquire title to a lode or vein which might afterwards be discovered within the boundaries, can so operate?

There are probably few words in our language in more frequent and familiar use, and the primary and accepted meaning of which is more generally understood by all classes of people, than the word *know* or *known*. In the primary sense of mental cognition of, of being assured, or aware of as true or actual, every ordinarily intelligent person understands the meaning and use of the word. In ordinary speech or conversation no one would use it as applicable to a subject imaginary in its nature—a subject of which no person could have mental cognition, or be assured or aware of as true or actual. No one would use it as applicable to a subject at the time entirely beyond the scope of human cognizance. None would think of applying it to a particular thing or subject which might or might not exist in the center of the sun, or in the center of the earth, or be hidden three hundred, one thousand, or ten thousand feet beneath the earth's surface. If by possibility, which cannot be admitted, the word could under any circumstances be so used, it would be a most extraordinary and exceptional use to make of it. It would not be in that ordinary, popular, or general signification in which the legislature is presumed to use words in expressing its will for the guidance and government of all the people, and which constitutes a cardinal rule in the construction of all statutes. It is to be presumed that congress weighed well the words it employed; and, the words not being technical, or words of art, but words in common and every-day use, having a common every-day meaning, it must be likewise presumed that they were used in that sense and not in any extraordinary or unusual one. Words of the kind are never to be construed in the latter sense, unless the intention so to use them clearly appears on the face of the statute; for, otherwise it would be for the court, not only to suppose that the legislature intended to mislead or deceive, but also to incur the risk of declaring that to be the legislative will which in truth never found expression as such. The rule of construction in such cases was stated by this court in

Maillard v. *Lawrence*, 16 How., 251, 261,

as follows: "In instances in which words or phrases are novel or obscure, as in terms of art, where they are peculiar or exclusive

in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all—may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. * * * * * And it would seem to be a most extravagant supposition which could hold that, in the enactment of a law affecting the interests of the nation at large, the legislature should select for that purpose language by which the nation or the mass of the people must necessarily be misled. The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private or social transactions; and wherever the legislature adopts such language in order to define or promulgate their action or their will, the just conclusion from such a course must be, that they not only themselves comprehend the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large."

In accordance with this fundamental and well-settled rule of construction, we respectfully submit that knowledge, by which we mean actual knowledge, of the existence of a lode or vein within the boundaries of the placer, is what congress intended by the language in question.

And in saying that actual knowledge was intended, we do not forget that there are various ways in which one may be said to know persons or things; as by their names, their internal properties or characters, by their figure, or by report, as well as in a direct manner by immediate personal intercourse or observation. We speak of the facts of history as of things known. We say we know there are such cities as London and Rome, although we have never been in either. But knowledge of the kind is never affirmed of things which may not be actually known through the medium of the senses—things incapable of being so known. We do not trust to report as knowledge of things which are beyond the perception of the mind. It is unnecessary to say, therefore, that knowledge by report on the part of a placer patentee of a lode or vein actually known to exist, and so situated and shown by outcrop or development within the boundaries of

a placer as to be capable of being included in the application for a patent, would not be sufficient to charge the patentee and work an exception under the statute in case it was omitted from the application. It is enough to say that no knowledge of that kind existed, or is claimed to have existed, in the case under consideration.

But there is still stronger ground, furnished by the language of the statute itself, for saying that only actual knowledge was intended. Upon this point the statute is, as it were, self-interpreting. It speaks of the vein "known to exist" as one cognizable by the senses of sight and touch, and with which there may be corporeal or physical contact—one capable of measurement in length and breadth, and on each side of which, in addition to its own width, there may be measured off twenty-five feet of *surface* to be paid for at a given price per acre. It speaks of it as a thing the internal properties or characteristics of which are known—as a vein or lode bearing valuable minerals within the definitions of congress. This also implies actual knowledge which cannot obtain of that which is concealed from observation, sight and touch beneath the earth's surface, and which at most can only be the subject of vague and doubtful theory or speculation, as men are accustomed to theorize or speculate upon that which is absolutely unknown to them.

The statute in question is part of the system of rules and regulations enacted by congress for the disposition and sale of the public lands belonging to the United States, to the citizens at large who, upon compliance with the terms and conditions prescribed, may acquire possessory rights and titles to such lands. Regarded in this light these statutes are no other than propositions or offers coming from the government to its citizens for the sale of its lands to them, which, upon acceptance by the citizen pursuant to the terms and conditions fixed, become a part of the contract between the government and himself, by which the rights of both are to be determined. In laying the foundation for such contracts, in entering into them and prescribing the necessary rules and regulations, congress must be presumed to have acted intelligently and deliberately, and to have expressed itself in language which could be plainly and easily understood by those to whom it was addressed, making use of words and phrases in their ordinary and most obvious sense, as understood and used by the people at large. If in any one case more than others, statutes call for such interpretation, it is under circumstances like these where they become matters of contract between the government on one

side and its citizens on the other. Under such circumstances they are to be construed the same as if they constituted parts of contracts between private individuals, or one private individual and another, and so construed we submit there can be very little difficulty in determining the meaning and effect of the phrase, "known to exist," as it occurs in this statute.

It is apparent on the face of the statute that congress very well understood that there might exist, and not unfrequently did exist, within claims known as placers, and purchased and paid for as such, lodes or veins, the title to which, unless specially excepted, would pass to the purchasers under their patents. With these facts before it, and the attention of congress particularly directed to them, it was resolved to make some exception of such lodes and veins from the general operation of the patent, and that resolution found expression in the words under consideration, which mean no more than if congress had said to the proposed purchaser: "But if you know, at the time of your acceptance of this proposition, and purchase and entry, that there exists within your placer claim a vein or lode outcropping or discovered, and so situated within the boundaries thereof that its width can be ascertained by measurement, and on each side of which you can measure off twenty-five feet of your surface ground, and you do not include in your acceptance or application a statement of the existence of such lode or vein, and an offer to pay for the same according to its width, together with the twenty-five feet of surface ground on each side of it, at the rate five dollars per acre, then your omission so to do shall be construed as a conclusive declaration that you have no right of possession of such vein or lode." Such seems to be the utmost extent, as shown by the language used, to which congress intended to go in creating an exception to, or limiting the general operation of the patent. In fact, as will presently be seen, it is very questionable whether congress intended to go so far or to except anything but an actually located lode claim within surface boundaries of the placer. If the language in question had occurred in a contract between man and man, resulting in a conveyance of land from one man to another, containing a like exception, and the court were required to determine what the lode or vein was which was excepted, we submit that it could not be held to be any other than that for which we contend. In this case, as in that, the court must ascertain the lode or vein excepted by the description of it contained in the contract, omitting none, but giving proper force and effect to all the words constituting such description. In either case the excep-

tion would not be extended to a lode or vein, not within the descriptive words—one to which such words could not be applied. The contract, having been entered into with deliberation and care, is conclusively presumed to express the full intent and meaning of the parties with regard to the matter or thing excepted, as well as in all other regards. In either case, if the grantor be dissatisfied and say that ought to be excepted which is not, the answer is that he should have so provided by his contract, and that to introduce an exception not shown by their language to have been within the intention of the parties, is to make a new contract, not to enforce one already made.

In a transaction between individuals, let it be supposed that A, the owner of a tract of land—a patented placer claim for example—within the boundaries of which, judging from its situation and surroundings, it is supposed or believed that a lode or vein may, upon exploration, be found, bargains with B. to sell the land to him, but says to him: "If you *know* that a lode or vein exists within the ground, then it is my intention to except it from the deed;" and the deed is prepared and accepted accordingly, and B. afterwards explores and finds such vein; whereupon A. makes claim to it as being within the exception, and brings his action for the possession—can A. recover? It being conceded that the existence of the vein within the ground was in fact unknown at the time of the sale, can A. recover by simply proving that B. *supposed* or *believed*, or had a theory at the time of his purchase, that a vein might be so found? Most certainly, we submit, that he could not—that no court would feel at liberty to strike out the word "known" and substitute for it "supposed" or "believed" in a conrtact of that nature; and, if not in that, then not in this case, for the rules of construction are in both cases the same. Acting upon the possibilities or probabilities of a lode being found within the ground, and bargaining, as shown on the face of the contract, with reference to such possibilities or probabilities, the answer to the claim of A. would be that if he had intended to except a lode or vein *supposed* or *believed* to exist, he should have used words to that effect in his contract, instead of those which would convey a very different idea and purpose to the mind of his grantee.

As it would be in the case of an individual, contracting and conveying, so, we insist, it must be here with respect to the rules of interpretation, with this difference only, that if there is to be any more liberal rule adopted in the one case than in the other, it should be in favor of the purchaser from the government. The

well known liberality of congress in the disposition of the mineral lands belonging to the United States, designed to encourage men in hazardous enterprises in which they often lose all and gain nothing, should lead to correspondingly liberal rules of construction, in harmony with the spirit of the enactments. Dealing with the mineral lands in this way, in fact giving them away to the hardy and enterprising class of men who are disposed to embark in the business of mining, (for no miner, be his possessions large or small, is obliged to enter, pay for or patent, but may have the fullest use, protection and enjoyment by mere occupancy and performance of a small amount of annual labor,) the langauge of congress should not be subjected to narrow, strained or illiberal rules of construction, affecting the rights of purchasers. In a position to deal liberally as it pleased, and disposed as congress was, to be generous to purchasers, the words of the statute are to be liberally construed, rather than otherwise, in favor of the titles and claims of purchasers. With the likelihood before it that lodes or veins might exist and be subsequently found within placers, and well knowing that there would be theories, beliefs and speculations in the minds of purchasers as to whether they existed or not, congress saw fit to except *known* lodes or veins of the kind described in the statute, unless the purchaser included them in his application; and, that there might be no doubt about the effect of the patent as to *unknown* lodes or veins, to expressly declare that "where the *existence* of a vein or lode *in a placer claim* is *not known*, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof." This language is very clear and specific, adopted, apparently, with great care to indicate that the lode or vein which it was intended to except was one known *in the placer*, and not outside of or at a distance from it, and which might not exist within it. And hardly less clear and specific are the other important words of the statute declaring the exception of a vein or lode "known to exist *within* the boundaries of a placer claim." If ever the word "known" was used in its primary, literal and ordinary sense of actual knowledge, it would seem to be so here.

But there seem to be very strong, if not unanswerable reasons for holding that it was the intention of congress to except nothing from the operation of the patent save a mining claim located according to the provisions of section 2320—one where the discovery of the lode or vein within its limits had been made and the claim extended and marked "on each side of the middle of the vein at the surface," as prescribed by that section. The lan-

guage of the exception is, "and where a vein or lode, *such as is described* in section *twenty-three hundred and twenty,* is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode *claim,* shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode *claim.*" The repeated use of the word claim will not be overlooked. It seems plainly to indicate that the exception intended was of a lode *claim* within the boundaries of the placer claim, which could be no other than one located by having its lines extended and marked on the surface of the ground within the placer, with the certificate of such location properly recorded as required by local rules and regulations, since those are the only ways of claiming a vein or lode, or by which a vein or lode claim can legally exist. It indicates that congress did not intend that the thing excepted should be left in doubt and uncertainty, to become the subject of future strife and litigation, with the ever varying results of jury trials in such cases, but that it should be a lode or vein which had been claimed in the manner prescribed by law, and in that way so well known and notorious that knowledge of its existence within the placer at the time of entry could be easily and satisfactorily established.

But if the intention was not to go so far as that a located lode claim only should be excepted, the language in question clearly shows that it was a visible, tangible vein or lode, one capable of location as provided for by section 2320, which was intended. That section, in connection with section 3222, clearly shows what those veins or lodes or other valuable deposits are, possessory rights and titles to which can be acquired under a claim or location, denominated in the statute a vein or lode claim. They must be such as extend by their edge, top or apex through the country rock or other surrounding formation, upwards to or towards the surface ground, and downwards perpendicularly, or departing more or less from a perpendicular into the earth, so that the given portion of surface ground on each side of them may be taken up and appropriated by the claimant. Nothing, we submit, can be plainer than the intention of congress in this particular, by language iterated and reiterated whenever allusion to vein or lode claims is made. Nothing, therefore, in contemplation of the statute, is a vein or lode claim which does not come within this description, and all other claims to valuable mineral

deposits in lands belonging to the United States must fall within some other, if they exist at all as claims recognized by law.

And the reference in section 2333 to a vein or lode, *such as is described* in section 2320, makes, if possible, the intention of congress to except only such lodes or veins as are *actually* known to exist within the placer, still more clear. The vein or lode described in section 2320 is not only one visible and tangible, and so susceptible of location with the requisite surface ground on either side, but one which has been actually *discovered* and so must be actually known.

From the situation of the vein in controversy, the impracticability, indeed, the utter impossibility, of its having been applied for and included in the patent for the placer, is apparent. If the title did not pass by the patent, it is apparent that nothing which the placer patentees could have done would have enabled them to acquire it. Section 2333, in its every word and phrase, forbids its application to such a vein as one which, if known, could have been surveyed and paid for and included in the placer patent as a vein or lode claim. We insist, therefore, not only that the vein in question was not excepted or intended to be, but that the acquiring of title to it by the placer patent, and as placer, was the only mode of so doing and that which congress intended. To have covered the same ground with lode locations, of which, in proper cases, there may be any number by any one locator, thus attempting to appropriate the nearly horizontal mineral deposit several hundred feet beneath the surface in segments or parallelograms according to the surface lines of such locations, would have been clearly unauthorized, and such claims, if made, would, if of any validity, have been neither more nor less than placer claims. But the laws of congress do not contemplate or justify any claims or locations of that kind. All mining claims and locations belong to two classes. The first are vein or lode locations which have been already described; and the others are claims usually called "placers," which include all forms of deposits except veins of quartz or rock in place which can be claimed or located as veins or lodes. Sec. 2329. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are declared to be free and open to exploration and purchase. Sec. 2319. It is obvious, therefore, that congress intended that all such deposits, if known to exist and not located or locatable with definiteness and certainty as lodes or veins, might be acquired under the denomination of "placer" and by virtue of a placer patent. The nature of this extensive "blanket" deposit or

vein in and about Leadville, undulating with the surface of the country, but frequently broken by dykes and violent upheavals, has come to be somewhat better understood. At the time of the entry in question little or nothing was known of it. But, after years of exploration and development and the most expensive strife and litigation, its character at the present day as a lode or vein is by no means established. It is still the subject of contention and dispute in that particular, as well among practical miners and experts as among courts and juries. The right of the lode claimant, asserting title by the top or apex, to follow it on the dip, whenever an adverse interest arises, is still as warmly and earnestly contested as ever and with the same uncertainty of result as has attended past litigations and trials, where the juries have sometimes found it to be a lode, but in a far greater number of instances that it was not. The doubtful nature of this deposit, as shown after repeated trials, generally resulting adversly to the right asserted by the lode claimant, has become part of the judicial history of mining claims and properties in and about Leadville, which must be more or less familiar to this court. Under these circumstances if anything can be said to have been established or to have approximated towards a settlement of the vexed question by trials and verdicts, it must be that such mineral deposit is not a lode or vein, and so is the proper subject of claim, location and entry as placer; a view, which, had it early prevailed, might have saved much expensive litigation and trouble.

And again, the instability and uncertainty of titles which must ensue if the doctrines held by the court below, as well by the instructions given as by those refused, are to prevail, cannot but attract attention of the court. If the title to lodes or veins in fact unknown are to be considered as not having passed by the placer patent because somebody had a theory, belief or intent to acquire them in case they should afterwards be found to exist within the boundaries of the placer, then it is plain that under no circumstances could greater doubt or uncertainty of title be produced. There could never be any safety of such titles, but all would depend upon the fickle and uncertain verdicts of juries, now finding one way and now the other, upon such feeble and unsatisfactory evidence as was produced upon the trial of this cause. If there are to be any such doubts and frailty of title it is not upon the teachings of this court hitherto that they are to be established. The practical operation of such doctrines is obvious. Years after the entry and patenting of a placer, a lode or vein is discovered

within it and a purchaser presents himself. He examines the law and the patent and may be supposed to take legal advice on the question of title. He reads and is advised, at least we may assume that he might be so advised by respectable members of the legal profession, that, if the vein or lode was not known to exist within the placer at the time of application and entry, it will be safe for him to purchase. He is advised that such is the clear and ordinary import and meaning of the words creating the exception and that he has only to investigate and satisfy himself as to the fact whether the vein or lode was known to exist within the placer at the time of application and entry, and if he finds that it was not, then he can safely purchase, because by the law and the patent all unknown lodes and veins were expressly conveyed to the patentee. He makes his investigation and satisfies himself beyond question not only that the lode or vein was not known to the patentee at the time of entry to exist within the placer, but that it could not by possibility have been known to the patentee or any one else, for the reason that it was first discovered within the placer and more than three hundred feet beneath the surface and six years after the entry. Under these circumstances and acting upon such clear and satisfactory information he makes his purchase of the lode or vein, together with sufficient of the adjacent ground to enable him to work and develop with convenience and profit, and enters into possession and working. Suddenly he finds himself dispossessed by a stranger who, though claiming no right or title to the lode or vein, informs him that he obtained no title by his purchase, and that the premises are open to the use and occupation of any person who sees fit to intrude, and that for such intrusion there is no help. Not satisfied with the views of his intruder he brings his action to dispossess him, and when he gets into court he is met with proof, not that the lode or vein was known to the patentee to exist within the placer, or that it could have been so known to him or any one else, but with proof that John Jones, who was, so far as he knew, a total stranger to the patent, had before entry, entered into an *oral* agreement with the patentee that he, Jones, would buy the placer after entry, and that a deed in the usual and regular form appearing in the chain of title executed by the patentee to Jones, was made in pursuance of such oral agreement, and that Jones, before the entry, had admitted or declared to A., B., C. and D., likewise strangers to him, the purchaser, that he, Jones, had a theory, hope or expectation, that a lode or vein might afterwards be found within the placer; and thereupon the purchaser finds his title adjudged void, himself

turned out of court with a bill of costs by a mere intruder in possession, whose rights for all the purposes of legal redress are far better than his own. He finds not only that he has no right to the possession of the vein or lode itself but that the intruder has the better right to the adjacent ground which he had purchased and paid for, and without the possession of which it is impossible to enter upon, extract and remove the ores from the vein. Such would be the practical operation and such the uncertainty which, upon the rulings and instructions of the court below, would attend every such title.

And such was in fact the very operation in this cause. Wells and Moyer made their application for patent May 16th, their entry July 22d and their deed of conveyance to Stevens and Leiter October 8th, 1878. Stevens and Leiter conveyed to the plaintiff, The Iron Silver Mining Company, in March, 1880. Presumably The Iron Silver Mining Company was a purchaser in good faith for value, having no notice of the matters relied upon to defeat the title to any lode or vein not known to exist within the boundaries of the placer at the time of entry, but which might afterwards be found therein, and yet its title and right of possession are taken away and transferred to an intruder, without a shadow of evidence showing or tending to show that it had any knowledge or information respecting the alleged oral agreement, or in regard to the theory or supposition of Mr. Stevens that a lode or vein might afterwards be found. It seems hardly necessary for us to argue here that it could never have been the intention of congress that the title to real estate under government patents should rest upon any such precarious and slippery foundation, or that it was not the intention of congress that purchasers should be bound to look outside of the language of the patents and the laws under which they were issued and make inquiry into facts like these not suggested by such language, at the peril of losing their titles in case they did not do so. It is something altogether new in the laws governing the purchase and sale of real estate if purchasers under such circumstances, before they can safely buy, are bound to ascertain the theories upon which owners, patentees or others acted, or the motives by which they were prompted in acquiring their title—to go not only to the theories or motives of the patentees, but behind or beyond them to ascertain whether any other person was directly or indirectly interested in the entry, and after that by inquiry of *all mankind* to ascertain whether such person had any theory or motive which might possibly become the subject of judicial cen-

sure or criticism. And yet such was the *theory* upon which the learned judge of the court below swept away the title and right of possession of the plaintiff in error and gave the possession to mere usurpers who disavowed in open court any legal right or claim to the same.

If, instead of being an action at law, presenting only a naked question of legal title under the patent, the proceeding below had been a suit in equity by the United States to vacate the patent, on account of the matters which the court was pleased to look upon as fraudulent (and it was really as such suit that the cause seems to have been tried and determined), no such consequences would have followed to the plaintiff in error. Without proof that the plaintiff in error acquired its title with notice of the alleged oral agreement and of the supposed fraudulent theory speculation or surmise of Mr. Stevens, the burden of which proof would, upon plea, have rested upon the United States, such title and right of possession would not, in that case, have been disturbed or affected; and yet in this case, with no such proof, with no opportunity to vindicate the *bona fides* of its purchase, without such *bona fides* even being assailed, its title and right of possession have both been adjudged void, and that, too, upon a theory, notion, or intent, secret and unknown to it, once existing in the mind of Mr. Stevens, one of its grantors. It would be bad enough for the plaintiff company, or its grantee, since the commencement of the action—The Nisi Prius Consolidated Mining Company—whose rights it still represents under the Code, to lose its property upon any such ground, even with an opportunity to defend; but it seems still more hard and oppressive to lose it without such opportunity. In any case, or under any circumstances, we should confidently insist that the presence of a theory, expectation, hope or belief in the mind of any man, the patentee or any other, with no knowledge or means of knowledge, as to the existence of a vein or lode within the placer boundaries, could not be made the foundation for any charge or inference of fraud whatsoever, by which the validity of the patent, or any title obtained under it, could be in anywise affected; and *a fortiori*, that the same could not operate to convert the theoretical or hoped-for lode into a *known* lode within the exception declared by law and contained in the patent. If the law had said that the applicant for a placer entry should have no theories, hopes, expectations or belief with respect to the existence of lodes or veins therein, or if he had, that he should disclose them with his application, and, if having them, he had failed to disclose, there might be ground for charging him

with fraud, or assailing his title for such omission. But the law has said nothing of the kind, but only if a lode or vein is known to exist in the placer, and he does not apply for it in the manner pointed out, it shall be excepted from his patent; and a patent is issued containing such exception, under which the only question which can arise is, whether the lode or vein was so known to exist at the time of the application. If it was, then the title did not pass, and, if no title passed, being specifically excepted, then how can that which was expressly not intended to be and was not within the conveyance, be the subject of fraud or wrong on the part of the grantee or patentee, by which the conveyance itself can be said to be tainted or made void or voidable? It is certainly very difficult for us to perceive how such a thing could be.

But assuming that there might be a fraud in this respect which would render the patent voidable, a belief which, in the language of the charge, "would amount to knowledge," and which a court of equity might seize upon and denounce as a fraud which should avoid the patent, still at law the patent must be construed according to the plain import of its words and the words of the statute under which it was issued; and if, when so construed, it appears, upon the facts of the case, to have conveyed the title in controversy, it must be so held. No proposition is better settled than that a patent or other conveyance, voidable for fraud, is nevertheless good to pass the legal title according to its terms, until it is avoided by proper proceedings instituted in equity for that purpose; and none better than that such proceedings must be instituted and carried into effect by the party aggrieved. Third persons, strangers to the patent or conveyance, can take no advantage of the fraud, either at law or in equity. If the views entertained by the court below, and the instructions complained of, could in any case be said to be correct, it would only be in a proper equitable proceeding to avoid the patent and set aside the title to the actually unknown lodes conveyed by the patent. In the action at law they were clearly erroneous. If there was fraud in obtaining, through the proper channels and in the proper form, title to the land as placer, which was not placer, or in obtaining such title upon the supposition or belief that there were or might be unknown lodes or veins therein, which would pass by the patent, the trial of an action of ejectment founded on such title against a mere intruder was not the time or place to show it.

In general we deem it unnecessary, after this discussion, more specifically to point out or comment upon our objections to the several instructions given, and the requests to charge refused,

upon this, the most important branch of the case. They are quite apparent without such specification or comment. Upon the instructions numbered (5), (6) and (8) we desire to add a few words.

To be clearly understood, numbers (5) and (6) must be read together. In number (5) the question of knowledge under the statute was taken out of the case altogether. The jury were told that it was unnecessary to declare what circumstances might be sufficient to affect a patentee with such knowledge, for the reason that, if in any case it appeared that an application for a patent was made with intent to acquire title to a lode or vein which might exist in the ground beneath the surface of a placer, a patent issued upon such application could not operate to convey such lode or vein. This was in effect saying to the jury that there could be no title under a placer patent to any lode or vein, known or unknown, within the boundaries of the placer, if the patentee intended to acquire such title. In other words, this was saying to the jury that if the patentee intended to acquire, in the case of an unknown lode or vein, just what the law of congress and his patent expressly gave him, such intent would neutralize and destroy the law and the patent, and he would obtain no title. In still other words, it was saying to the jury that an intent based upon and authorized and encouraged by the law, if entertained or acted upon by the patentee, worked a forfeiture of estate, if not corruption of blood. The law of congress holds out to placer patentees as an inducement for their purchase that they shall acquire title to all unknown lodes or veins within the boundaries of their placer claims, and yet, if they act upon such inducement and intend to acquire the proffered title, they shall take nothing by their purchase. Such was the instruction upon which, regardless of every other fact and circumstance, if the jury found the intent, as they could not well find otherwise, their verdict must be for the defendants. The intent based upon the law and looking to acquiring just what the law expressly declares should be given, becomes an unlawful intent.

Number (6) is, we submit, equally wide of the mark and erroneous. The intention could be formed and could exist without investigation as to the character of the ground or belief as to the existence of a valuable lode therein, "which," it was added, "would amount to knowledge under the statute." The intent of the purchaser of land to acquire whatever is erected or growing upon the same, with whatever is beneath or above the surface, according to its legal definition, unless there be some reservation,

may always be said to exist, and its existence by no means implies previous investigation or belief as to that which is not open to sight or view. But, as we have already said, such intention may have been formed solely upon the provisions of the act of congress, without any investigation or belief as to the existence of lodes, the purchaser taking his chances in that particular. But if he did investigate and did believe, but did not know, and in that way form his intention, was there anything unlawful or improper in his so doing? Did he violate any rule or principle of equity or good conscience? Did he do anything more than is lawfully done every day among people who are buying and selling? Was it anything more than congress supposed or intended might be done by such purchasers? He certainly stood in no fiduciary relation to the United States, which required him to disclose his investigations or state his belief. The utmost that congress required or that the land department could require, was that he should state his knowledge, and if he had no knowledge, and said so, how could a charge of fraud be based upon his action?

The instruction numbered (8) is but a reiteration of the doctrines contained in numbers (5) and (6). It was there laid down as a distinct and entirely independent proposition that if it appeared to the jury that the purpose was to secure such lodes or veins *as might be* found on the mountains within the limits of the placer claim, such purpose could not be effected in any such way. Here again no distinction was made between known and unknown lodes or veins, while the statute declared that the title of the latter should pass, though that of the former might not, unless specially applied for. This instruction, in common with the the others, proceeded upon the supposition, or rather, we should say, admitted fact, that the lode in question was unknown, and that to take it out of the operation of the patent it was necessary that all distinction between known and unknown lodes should be disregarded, which was the primal error occurring on the trial of the cause.

VII.

No more palpable mistake could have been made than that in instruction numbered (1), as to the acts of congress regulating the location of lode and placer claims and the difference between them. The jury were there told that the quantity of land which might be taken in a placer location was much larger than that which might be acquired in a lode location, an error most grave

and detrimental to the plaintiff, when considered in its bearing upon the question of intent, as submitted by the court to the jury. The jury were given to understand that much more valuable mineral land could be acquired in the form of a placer claim, location, entry and patent, than by lode claim, location, entry and patent; which, if true, might very justly lead to the inference that it was the intent of the patentees to acquire large lode possessions and titles which otherwise they could not obtain. Now, instead of the proposition having been correct, it was the very reverse of correct. In the first place, a lode claim and location, as authorized by the laws of congress, exceeds, or may exceed, by about two-thirds of an acre, the size of a placer claim and location, the former containing twenty and two-thirds acres, whilst the latter is limited to twenty acres. Both may be less, but neither can exceed the number of acres specified. In the next place, there is no limit to the number of lode claims and locations which may be made at the same time by the same individual or locator, whilst the placer claimant or locator can make but one claim and location at the same time. The placer claimant may not be, like the pre-emptor, precluded from making a second or other subsequent location after he has disposed of his first or other subsequent claims, but he is precluded from holding by claim and location more than twenty acres at any one time. The language of the statute (Sec. 2331) is that "no such location shall include more than twenty acres for each individual claimant." The placer claimant can have but one such location at any one time as locator, although as purchaser from other locators he may hold many more. Such seems to be the obvious meaning of the statute and the interpretation which we understand it has received in the judgment of this court in *Smelting Co.* v. *Kemp*, 104 U. S., 636, 650, 651.

The advantages, therefore, of a lode locator desirous of securing extensive tracts of mineral land, over him who claims and locates as placer, are immense. They may be as ten to one, a hundred to one, or a thousand to one, proportionate to his means or ability to take possession of and mark his claims, and do or cause to be done the necessary amount of annual labor. The placer claimant can make but one claim and location, and whether he can extend his possessions or not depends upon whether he can find other locators ready and willing to sell and convey to him. The lode locator, according to his means, is governed by his own will and pleasure as to the extent of his possessions of the previously unoccupied public lands, while the

placer locator must consult and be governed by the will and wishes of others.

Nor does it make any difference that the size of lode claims may be limited by local customs, rules or regulations, since the lode locator has but to multiply the number of his locations to acquire the same extent of territory.

Nor is there any advantage in the one case over the other so far as patenting is concerned, since all contiguous claims, whether lode or placer, belonging to the same person, association or corporation are subject to being patented upon a single application. The statute (section 2325) provides for patenting "the claim or claims" of the applicant upon such application, and the validity of patents so applied for and issued was expressly ruled in the case last above cited.

In the present case ten individuals were required in the first instance to make claims and locations, afterwards consolidated, of the placer, whereas, had it been proper or possible, as counsel opposed contend, to occupy the ground with lode claims, the whole might have been taken up by one man, Mr. Stevens, for example, and upon application title obtained under a single patent.

VIII.

The instruction numbered (9) was faulty, as applied to the facts of the case before the court and jury, even admitting that the patentees acquired no title to the lode or vein in controversy. The facts were that the lode was found extending laterally within the boundaries of the placer, at a distance of 300 feet and upwards beneath the surface. It was not a lode, therefore, in connection with which there was or could have been any exception or reservation of surface ground from the operation of the patent. In the statute the thing excepted is spoken of as "the vein or lode claim," which induces us to believe that it was only a located lode claim on the surface ground within the boundaries of the placer which was intended to be excepted. But, be that as it may, it is clear, in this instance, that nothing was or could have been reserved or excepted but the vein or lode itself, and such is the express language of the exception contained in the patent. When we say this is clear, we mean that it is clear to ourselves, for we know that some members of the profession, possibly the learned counsel opposed, if we may be permitted to judge from the practices of some of their clients, take an entirely different view and hold that the patentees, to say nothing about title to the lode or

vein, did not so much as acquire the right of possession of the surface grounds under their patent. If the patentees took nothing, not so much as a possessory right to the surface, then, of course, all was reserved or excepted, and the argument is at an end. It would be instructive, at least, as illustrating theories of the law sometimes entertained by gentlemen of the profession, could we hold up before this court a map of this placer, showing the lode locations made and pits sunk within its boundaries since the issuance of the patent, with a view to appropriate, within the lines of such locations extended vertically downward, the mineral deposits supposed to exist from 500 to 1,000 feet or more beneath the surface. It is safe to say that for every foot of the surface of the placer there are at least three, and sometimes many more, such claimants. The case is one where all are invited and advised to come and partake at their pleasure, and the only instance which has fallen under our observation where the doctrines of certain modern political economists and philosophers are, or have been attempted to be, carried into practical operation. Upon such a theory, and with nearly all local miners and claimants adversely interested, it is not surprising that many witnesses can be found in Leadville to testify to conversations with Mr. Stevens which he deposes he never had, or to distort or give a false coloring to what he may, in fact, have said.

But we digress, for until otherwise instructed, we must, in the language of this court, in *Deffeback* v. *Hawke*, 115 U. S., 406, insist that "the patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface." And with this understanding that the plaintiff was the owner and in possession of everything but the vein, that it owned and possessed the adjoining rocks and soil both above and below the vein, without the disturbing and taking possession of which it was impossible for the defendants to enter, break and remove the ores from the vein, we respectfully submit and insist that ejectment to oust and dispossess the defendants was the proper and lawful remedy, and that the title of the plaintiff to the inclosing soil and rocks, the possession of which was unlawfully invaded and taken by the defendants, was quite sufficient to sustain the action. The exception of the vein, which was equivalent to a conveyance of it by the grantee back to the grantor, undoubtedly carried with it to the owner of the vein, whoever he might be, the right of ingress and egress for the purpose of extracting and removing the ores, together with the right to break and disturb the

adjacent rocks and soil, so far as it might be necessary in the reasonable working and development of the vein and removal of the ores, but doing no damage to the inheritance beyond what might thus arise. But while such might be the right of the owner of the vein, upon what principles we ask could one having no right or title to it, a mere stranger and intruder, be protected in his unlawful attempt to do the same thing? As against such a person, has not the owner of the soil and the rocks, both above and below, the right to insist that they shall be undisturbed in his possession, just as they came to him under his deed or his patent? Has he not a right to say to the intruder: "I own and possess the rocks and soil above and the rocks and soil below, and choose to have neither disturbed until the owner of the vein comes and demands admittance"? May he not say: "Until the true owner comes to remove his oré, I prefer that my rocks and soil above should rest upon the vein as their natural support, and I also prefer and insist that the rocks and soil below shall not be taken from my possession and used by you as a road or way along or over which to carry out the ores from this vein"? Can he not still further say: "Even though you do not disturb the rocks or soil on either side, yet as you cannot remove the ore without dispossessing me and appropriating the rocks and soil to your own use so long as you continue to occupy and work the vein, I therefore forbid you to enter, and if you do so I will eject you"? Could he not rightfully say all these things and, if the trespasser persisted, could he not eject him? If ejectment be not the proper remedy in such a case, pray what is the remedy of the owner of the soil, or is he without remedy? As the trespasser removes the ore from the vein, leaving the denuded rock and soil above and below the open space left behind him, who, in such case, is entitled to the possession of such rocks and soil and such space but the true owner? And if he is entitled to such possession, how is he to gain it but by ejectment? And if he recovers in ejectment, as we submit he must, does he not recover on the strength of his own title and not on the weakness of his adversary's? We most respectfully insist that he does. If such be not his remedy, then the owner of the estate has none, and he must submit to being deprived of the possession and use of his property until the trespasser sees fit, voluntarily, to vacate. If the possession cannot be thus restored, it must be because of the fact that the trespasser, by reason of his aggressive and wrongful entry upon the premises, in search of that which belonged to another, has acquired the right permanently to occupy the

premises as against the true owner, and to control and use them as he pleases.

For ourselves we cannot distinguish the case from one where land has been sold, reserving the standing or growing trees to the grantor, and a stranger to the title of both the land and the timber enters, and, taking possession of the land, commences to cut down and remove the trees, and the owner of the land brings ejectment against him. In such case would it be any answer to the action of the owner of the land that he did not own the trees, but that they belonged to A. B., his grantor, and that, while the defendant was committing a trespass upon the property of the plaintiff, he was likewise a trespasser against A. B.? It would be very strange if such a plea could be sustained, and yet it differs not one whit from the plea which was sustained in the court below by the instruction here in question. The jury were told if the plaintiff had no title to the vein or deposit it could not complain because the defendants were in possession, since their trespass could not be a trespass against a person having no title; thus ignoring wholly the plaintiff's unquestioned and unquesable title to the adjacent rocks and soil, both above and below the vein or deposit, into the possession of which rocks and soil the defendant had intruded and from which they had wrongfully ousted and dispossessed the plaintiff. It was as if, in the case of the trees, the jury should be instructed if the plaintiff had no title to the trees, then the entry of the defendant into his land and premises, where the trees were growing and standing, would not be a trespass of which he could complain, since the trespass could not be a trespass against a person having no title.

The question in short seems to resolve itself in this: whether, if A. sells to B. a tract of land known to contain a valuable deposit of gold or other precious metal, excepting or reserving such deposit, it operates as a license to all the world to enter upon the premises and dig or explore for the gold or other precious metal. The case would seem to be one falling within the principle laid down in *Dygert* v. *Mathews*, 11 Wend., 35, that an exception or reservation, until the grantor or his assigns exercise the rights reserved, is inoperative, and the whole premises vest in the grantee who may maintain trespass against the stranger, or even against the grantor or his assigns, for an entry on the land for any purpose other than that specified in the reservation.

And a like principle was enunciated as against strangers to the title in

Curtis v. *Spring*, 15 Mass., 134,

where a grantee of the commonwealth, in surveying and fixing the bounds, had included more land within his location than his grant conveyed to him, and the defendants had entered upon the portion not within the grant and cut and removed the trees and timber, for which the plaintiffs, purchasers under the grantees, brought their action of trespass, which was sustained, the court observing: "It is wholly immaterial to the defendants whether the location covered more land than the terms of the grant would warrant. The plaintiffs were seized as well as possessed in regard to every one but the commonwealth, who might or might not reclaim part of the land located, as not conveyed." And the decision likewise proceeded upon another principle, which might not be inapplicable here, that the plaintiffs were liable to account to the commonwealth for the value of the trees which were in their possession.

If, under the peculiar circumstances here shown, and which we assume were not apparent to the court and were not considered when the cause was formerly before it, the vein or deposit was excepted or reserved, these authorities suggest the inquiry whether the possession of the vein or deposit did not pass to the patentees as well as the possession of the inclosing rocks and soil. We submit that it did, and that upon such possession the plaintiff could maintain its action. We submit that it did, and that in such case the plaintiff in ejectment must prevail against a trespasser, and in all cases except where a better title is shown in the defendants.

Winans v. *Chasty*, 4 Cal., 70.
Hutchinson v. *Perley*, 4 Cal., 33.
Jackson v. *Harder*, 4 John., 202.
Jackson v. *Derm*, 5 Cow., 200.

And especially do we invite the attention of the court to

Boggs v. *Merced M. Co.*, 14 Cal., 279, 376, and
Fremont v. *Flower*, 17 Cal., 200, 212.

And further, as showing, if the vein or deposit in controversy was reserved or excepted from the patent, that the defendants cannot be regarded otherwise than as mere trespassers upon it, we refer the court to sections 2318 and 2319. Section 2318 declares that in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. The only express direction of law is found in section 2319, which extends only to all valuable mineral deposits *in lands belonging* to the United States. The land in which the mineral deposit or

vein in question exists does not belong to the United States, and is not, therefore, by law free or open to occupation, exploration or purchase by any person, and any entry into or upon it is consequently a trespass against the United States, in which the title still remains. No breaking, or entering into, or occupancy of it can give any title or right of possession of the vein or deposit. If there were an outcrop or apex outside of the boundaries of the placer upon the still unappropriated public domain, upon which a lode claim and location could be made, and from which, upon the dip, the vein could, as provided by law, be followed into the premises in controversy, it might be that a right of possession and title could be acquired in that way. But no such condition of things exists, or is claimed or pretended to exist, and hence, until further legislation, no right of possession and no title can be acquired by any individual or claimant. And the reason for congress not having extended the right of exploration and purchase to mineral deposits belonging to the government, but in lands owned by private individuals, is very obvious. In the vast region of country acquired by cession from Mexico there existed numerous grants of land to private persons, the mineral deposits in which were reserved to the government of Mexico, and the title to which, by the cession, passed to the United States; and it was not the intention or policy of congress to authorize or invite miners, or others engaged in exploring for valuable mineral deposits, to enter upon the lands, the private property of the various grantees, for any such purpose. It was not, and has not hitherto been thought advisable by congress to assert the rights of the government in such cases; and the intention undoubtedly was, if ever such rights should ever be asserted, that careful provision should be made for protecting and preserving the rights of the owners of the soil. It was not the intention that explorers should be permitted to enter pell-mell upon the estates and lands of individuals, and hold possession of them for the purpose of removing valuable mineral deposits which might be found within them.

Assuming, therefore, that the title of the vein or deposit did not pass under the patent, the case, so far as the right to maintain ejectment is concerned, does not differ from that which would have been presented, had the title to the vein by location, entry and patent upon the apex outside of the boundaries of the placer been conveyed by the government before the entry of the placer, in which event the patentee or his assigns would have been the proprietors of it and thus it would have fallen within the third exception of the patent. In such a case, the vein or deposit

within the boundaries of the placer belonging to the owner of the outside lode claim, could not the owner of the placer eject a stranger who should enter upon it? Or would he be bound, merely because he did not own the vein, to submit to having his premises overrun and himself dispossessed by every stranger who saw fit to come? The answers to these questions seem obvious. The owner of the placer could eject and could protect his possession until the owner of the vein came and demanded admittance.

IX.

The second exception in the patent contains the words "claimed or known to exist." It is very well settled by the decisions of this court that the land officers, who are merely the agents of the law, have no authority to insert in patents any other terms or exceptions than those provided for by the law (115 U. S., 406). The court below, at the request of the plaintiff, by an instruction which does not appear in the record, because no exception was taken, accordingly informed the jury that exception was to be read as if the words "claimed or" did not appear therein. If the language of the exception had been "claimed *and* known to exist," it would have been in harmony with what seems to us to have been the intention of congress, namely, to except a known and claimed or located lode or vein, thus saving the right of such lode claimant, but otherwise not intending that there should be any reservation of title in the government.

X.

Lastly, we submit that the plaintiff's motion for a new trial should have been granted, if for no other reason, because there was no evidence before the court upon the question whether the vein or lode was known to exist at the time of the placer entry, should have been submitted to the jury, and none upon which the verdict that it was known to exist could be sustained.

For the reasons thus imperfectly stated, we respectfully submit that the judgment in the court below should be reversed and a new trial awarded.

L. S. DIXON,
For Plaintiff in Error.

APPENDIX.

The defendants' second witness, **Deutro** (pp. 42–3) gave testimony tending to show the discovery in 1878, of veins dipping to the east in the bottoms of the shafts of the H. D. and William Reddick claims which were located on the west of the placer. He was likewise examined as to conversations with William H. Stevens relative to the H. D., and with Mr. Moyer, one of the placer patentees, respecting the placer, to both of which objection and exception were taken by the plaintiff.

The conversation with Mr. Stevens was at the time of the purchase by him from the witness of the H. D. claim in which Mr. Stevens endeavored to persuade or bind the witness to make no more locations at that place, saying, "he owned that ground up there and he didn't want to get into any more conflicts; he didn't want any more trouble with anybody." Mr. Stevens owned the Stone and Rock, two other claims lying to the west of the placer, and said, "he thought his mineral ran up under there from the Stone and Rock."

Witness assisted Moyer in the survey of the placer, and while so doing Moyer, speaking of the top of the hill included in the survey, "said he thought there was mineral under that ground, and he wanted it for the timber too,"—"he could hold the mineral as well with a placer patent as he could with a lode patent,"—"he could embrace more territory with a placer, and he thought he could hold the mineral, *if there was any under there*, as well as he could with a lode claim." He likewise testified that at the time of survey there were no *known* lodes in the placer.

The third witness, **Devlin,** (pp. 44–5), gave testimony concerning several claims outside of the placer, in none of which was there any vein or contact exposed, save in the William Reddick. The La Plata, lying west, disclosed ore broken up, and also the Rock and Dome contained ore called carbonate, but from the work that existed in those claims witness could not say what the pitch or dip of the formation was. The A. Y., lying to the northwest of the placer, showed ore before March, 1879, but without workings to indicate any dip. Had known the Pennsylvania for about ten years—was in the shaft in 1882, which was not yet to contact, but still in wash. "There is no outcrop above the sur-

face of any portion of the Wells and Moyer placer, to my knowledge. I should know it if it were above the surface."

He likewise, under objection and exception by the plaintiff, testified to a conversation with Mr. Stevens in 1878, in which Mr. Stevens said "he believed the time would come that the whole country would be worked for carbonate ores, and that he had the outcrop of the vein, and that he was entitled to follow it as far as it extended. He gave the opinion that it did extend east. He said he believed if there was a shaft sunk in Oro it would strike the vein. He was talking to me about the Iron mine." The mining camp called Oro is situated to the northeast of the placer, and the Iron mine about three-fourths of a mile north of the placer.

The next witness, **Donath,** (pp. 45–7), was an owner in the H. D., and sold to Stevens at the same time as Deutro, and testified to the same request not to prospect made by Stevens on the ground that he, Stevens, owned the outcrop, and was "tired of fighting." Witness also owned an interest in the Reddick, which he sold to Stevens and Wood, in May, 1877, and in which the vein disclosed pitches to the east about fifteen or twenty degrees. Mr. Stevens was in the shaft and said: "Boys, you have a big body of mineral in here, but it all belongs to me." Could not say, from the workings in the H. D. and Stone, which way the vein pitched. Under objection and exception by plaintiff he gave testimony as to the character of the ground as placer, and of a conversation with Moyer about the survey of the placer, in which Moyer said he would take in certain claims belonging to witness and give him a bond for a deed, and in reply to the statement of witness that it was without value as a placer: "You know it ain't for myself; it is for Stevens, and you also know Stevens can't take the patent for the ground, and I took it for him."

The witness **York** (pp. 47–8) testified to locating a claim, called the Magnitude, within the boundaries of the placer in 1878, sinking a shaft 120 feet deep, finding nothing but float ore, abandoning it and locating another to the east, called the Leadville, doing a few feet of work upon it, and applying to Wells for and obtaining a bond, September 24, 1878, to convey it, provided witness "discovered a vein within a certain length of time after the date of the bond," and to making such discovery before March, 1879. He likewise testified to the discovery, off of the placer, of an outcrop of a vein, on the Nisi Prius, in the spring of 1878, but could not tell its dip; in the same year saw ore in the Pinnacle dipping east, and likewise ore in the Rock; the only places where mineral

had been discovered in 1878, so far as he knew, were in the Nisi Prius, Pinnacle, La Plata, Rock, Stone, and perhaps the Reddick.

Norris (p. 48) testified to the location, by himself and another, within the boundaries of the placer, of a claim called the Thomas Francis Meagher, but as to which he asserted no right against the placer entry, and on which, doing his last work in 1877, he had sunk a thirty-five foot hole with "only porphyry" in it. He further spoke of a conversation with Moyer, in which Moyer said that "Stevens was afraid to apply for a patent because the boys would adverse him."

The witness **Goris** (pp. 48–9) gave testimony only to the effect that Moyer's original claim in California gulch, upon which he mined prior to the entry of the placer, was from fifty to 300 feet in width; could not say whether placer mining was done outside of the gulch; knew the La Plata in 1873 or 1874, and saw a kind of carbonate on the dump in 1874; knew the Stone, Rock and Dome claims in 1876; heard of Crown Point and Pinnacle in 1877; was never in workings of either; knew Grey Eagle, a vertical gold vein, in 1872, and Moyer lode claim, but never examined it.

Another witness, **Chandler,** (p. 49) worked on Pinnacle, taking water from the shaft in 1877; "thought they had a vein there of carbonate ore," with nothing to indicate dip or direction; worked about the same time in the Reddick shaft, which was sunk fifty feet in porphyry, and one day, in 1878, on Nisi Prius, outside of the boundaries of the placer, where there was porphyry, iron, talc and lime, dipping to the southeast, and away from the placer; saw ore on the dump of Rock and Dome in June, 1877.

Gorman (p. 50) testified that placer mining was carried on along the bed of California gulch, extending from seventy-five to 200 feet wide on either side; prospecting for gold was done on the placer; located the A. Y., a claim to the north of the placer, in 1869, on carbonate and iron, found while mining in the bed of the creek, vein dipping eastward, between porphyry and lime; knew the Stone (lying north of the gulch) in 1875, and Oro La Plata in 1873; examined dumps, but not workings; appeared to have some mineral as in the A. Y.

Thompson (pp. 50–1) located Pennsylvania in 1869 and found out-crop at discovery shaft about twenty feet from surface; no part of the vein could come within the placer and was not the same lode as the A. Y. and Dome; threatened to adverse Wells and Moyer and got a bond for a deed for a small fraction of his claim lying within the placer; spoke of some abandoned gold

lode claims within the boundaries of the placer; saw ore on dumps of the A. Y. and La Plata, and knew the Rock, Dome and Stone.

Leonhardy (pp. 52–4) prospected on Rock Hill in 1868, saw out-croppings of iron carbonates on the Rock claim and made lode locations upon that claim which he afterwards abandoned; knew of no prospecting within the placer, though quite a number of lode claims were staked around it in 1879; had a conversation with Mr. Stevens in the spring of 1877 in which Mr. Stevens said he had spent over $30,000 last year in prospecting the country up there, and had found heavy bodies of mineral and knew what he got; had examined the ground thoroughly, shipped a quantity of mineral, found it profitable and intended to go into it extensively, that his examinations warranted him in believing that there was an immense body of mineral underlying the whole country, assaying silver and lead; that he didn't mention this particular placer, but spoke of the whole country being underlaid with masses of ore, leading witness to believe from what he said that both Rock and Iron Hills were underlaid with vast bodies of mineral. Witness added: "*You couldn't tell anything about it; it was simply a theory.* There were no other mines besides the Stone and Rock there in 1877. There was one dump on the Stone and one on the Rock. I think that was all there was there when Mr. Stevens made his *prediction* to me." Witness gave some further testimony, not material to be stated here, respecting some abandoned locations upon supposed perpendicular veins, a fourteen foot hole on the Pennsylvania sunk in wash and a shaft on the Vermont 600 feet deep still in porphyry.

The witness **Arnold** (pp. 53–4) knew of the existence of carbonates on Rock Hill some time about 1874 from the dump of the La Plata claim; described the placer claims as worked in California Gulch for many years after 1860—gulch claims in the center and patch claims on either side; never saw Moyer working on side claims; described smooth and rounded condition of placer ground; prospected the placer some in the sixties without finding placer gravel of any extent, and don't regard it placer ground because it don't bear enough gold; not familiar with Crown Point and Pinnacle claims, but know of them; couldn't get an idea that the La Plata was a lode from examing the dump, "didn't get any information from examing the dump, because we didn't know what carbonates were. We often found them in the gulch below while placer washing. We called them, at that

time, galena. They were of no consequence to us because there was no way to machinery."

Barnard, (pp. 54–5) knew the La Plata on which a shaft was sunk to mineral—hard carbonate, in 1872; knew the A. Y. which showed carbonate between porphyry and lime: saw dumps with carbonate ore on the Rock and Dome in 1877; knew the Crown Point and Pinnacle in 1877; knew the 1860, a gold lode claim, in which witness never saw mineral of any kind and which was situated partly on the Wells and Moyer and partly on the William Moyer placer, which joins the Wells and Moyer on the north; knew William Moyer and had a conversation with him about the placer claim on account of the conflict with the 1860, in which Moyer said Mr. Stevens would either buy the the 1860 or deed it back. Witness understood Mr. Stevens was going to buy the placer as a placer claim, and asked Moyer what he wanted with the bluff on which the 1860 was, to which Moyer replied: "It is Mr. Stevens' plan to take this ground, the timber on the ground is valuable, and then, it is expected there is mineral under it." Witness also talked with Mr. Stevens in regard to the placer when he sold him the 1860 in 1878, when Mr. Stevens "said he was anxious to get a good title to the property, and wanted no conflicts afterwards;" thought Stevens said something about being underlaid with mineral, but did not positively recollect. Witness spoke of some gold lode claims located on supposed vertical veins: was never underground in the La Plata, Rock or Dome, but formed an idea that the vein dipped to the east from the working on the La Plata four or five feet and again at fourteen feet in depth.

Mr. Evans (pp. 55–7), after making some explanations as to the workings for free gold in California gulch from 1860 down, extending from eighty to one hundred feet on either side, testified that he had several talks with Mr. Stevens, in 1877, about the line of outcrop of the vein on the Iron, Bull's Eye, Lime, Stone, Rock and Dome claims, extending from the Iron south, in which Mr. Stevens, "talking about the Iron mine north of the Wells and Moyer placer, situated on Iron hill," and referring to some locations made to east of it, said: "Yes, Mr. Evans, I will drive all those people out who locate east of me, for I have got the apex across California gulch to the hill on the south side of California gulch, between that and Oro;" that "Stevens claimed that the locations mentioned were on the out-crop of the same vein included in the Rock and Dome." Witness worked in 1861 on what is now known as the Rock in a "tunnel seventy-five

feet in a mass of brown carbonates and black iron;" was in the workings of the Rock in 1877 and 1878, and "they had no particular walls at that time."

"We had a public meeting at the time the surveyors of the Atchison, Topeka & Santa Fe road came to Leadville, in the latter part of September or early in 1878. A banquet was given to the first engineers surveying a road there. Mr. Stevens illustrated the geology then as he always did in his talk with me, that the strata or layer of ore followed the lime in a bed. He delivered a sort of lecture upon the facts as they had then developed themselves. He said the vein ran from the north to the south and dipped to the east; that he had the apex of it and the out-crop and could follow it under the ground, showing immense bodies of ore and the richness of that country. His descriptions extended on the out-crop from Stray Horse to beyond California gulch. He said in his address that underlaid the whole country from Leadville to the Mosquito range, about five miles in a direct line. His developments at that time hadn't gone to any very great extent. There were no claims that I know of on the placer in the spring of 1878."

Witness described all the developments at that time existing on which "Mr. Stevens based his opinion," as being a tunnel run 150 feet south on the Rock, another eighty to 100 feet on the Rock or Dome with slight workings, merely the starting of a shaft, above on the hill, and a number of cuts on the Iron, 3,000 feet away, with a working shaft between twenty and thirty feet deep, and added: "There was a great diversity of opinion at the time of the public meeting as to where the veins were. *It was only a matter of opinion with anybody.* * * * I should judge the speech was made because the railroad men were there for the purpose of showing there was sufficient ore in the country to warrant them in building a railroad."

The testimony of **Baldwin** (pp. 57–60), a witness examined on the former trial but since deceased, was read from the phonographer's notes and was to the effect that he knew the Oro La Plata, the oldest location on Rock hill, and made surveys of the Pinnacle intended for a patent in the fall of 1877 or early in 1878; examined the Crown Point and the apex, November 16, 1884, and traced the vein, though not continuously, showing porphyry above and lime below, through the workings of the defendants from the extreme west to the eastern point, in all of which there was a dip in an easterly direction amounting to from fifteen to eighteen degrees; had been familiar with the

H. D. since 1877; "was informed by Mr. Stevens that they were intending to let the Wells and Moyer placer men in this vicinity get a patent on the ground which lay to the south of the Rock and Dome and deed to them—get a patent in their own name, which was afterwards done. In conversation from time to time with Stevens he had the idea that the lode, exposed along the line of lode claims, extended in the east direction on the dip, and that by taking up placer claims on the outside they could keep parties from getting patents on them, and keep parties from sinking further down on the dip and save trouble that way by getting title to the surface ground, and it was for the timber that lay on the claims; but it was for the purpose of protecting the title to the lode claims."

He further testified that there was, in 1877, a shaft fifteen or twenty feet deep on a claim called the Summit, located in that year by Wood and Stevens, at the west end of the Crown Point and Pinnacle, and on ground now comprised in the placer, and a shaft on the Gnesen, about forty feet deep, not sunk to contact; and that in the fall of 1877, or early in 1878, he made a survey for Stevens and Leiter of a portion of the placer, including the Gnesen, which, at the time of the survey, was called the Stevens and Leiter placer; knew of Wells and Moyer working placers in Eureka Gulch in 1877 and 1878; that the westerly portion of the placer was at that time vacant ground; that within its boundaries, on the easterly portion, there were considerable diggings from Eureka and California gulches; that there had been many placer claims there, titles by possession, which had existed since 1860, a portion of which along Eureka and California gulches were included in the placer; and that Wells and Moyer, before the time they applied for a patent, had gone to the expense of bringing in on the placer what was called Iowa gulch ditch, and were carrying on placer mining there with water from that ditch.

This witness also testified (folio 107) that the end lines of the Rock and Dome produced indefinitely forward and downward from the points where those lines cross the apex of the vein outcropping within them, would include the vein at the place in in dispute in this case.

Bates (pp. 60–3), who surveyed the placer, described the developments on the Rock and Dome, in the spring of 1878, substantially as they were described by Evans; there was a shaft on the Stone which disclosed the vein at the bottom; the vein, as disclosed in those several workings, had a hanging wall of porphyry and a foot wall of lime, with the dip to the east and strike

to the north; each one of the claims located by Stevens and Leiter disclosed ore and a vein; "the development wasn't very extensive, however, at that time," covering the strike of a vein some three-fourths of a mile from the Iron on the north, to the Dome on the south; prior to the summer of 1878 heard Mr. Stevens state it was his opinion that it was all one continuous vein, and underlaid the whole country from that outcrop to the next break in the limestone east, and ran to great depth in the mountain; surveyed the placer at the request of Mr. Stevens, and as marked out by him on a map, in February or March, 1878; was instructed to leave out *bona fide* claims owned by other people, and was paid by Mr. Stevens' agent; as reasons for taking up the ground, Mr. Stevens stated he thought this vein ran under that ground, and he thought that if he had the surface rights to this ground he could prevent litigation by keeping outsiders off it; had a conversation with Moyer at the time of the survey about taking the upper part of the hill, as to which he and Moyer differed in their understanding about Mr. Stevens' wishes; prior to the summer of 1878 heard Mr. Stevens deliver a lecture on the geology of that district, and at a dinner given by Mr. Stevens to a number of gentlemen, at which witness was an invited guest, Mr. Stevens discussed the formation there, and "illustrated his theory" on a blackboard, on which his sketches included all the territory between Leadville and the top of the range, quite a long distance north and south, and "were intended to represent the formation—the geological make-up of the country," showing veins which he claimed ran north and south, and dipped to the east, and which, "when they were opened up," would prove to be of great extent, and Leadville would be one of the greatest, if not the greatest, mining district in the country. "* * * I believed in Mr. Stevens' theory that they underlaid the whole country; I had nothing to base it on except the slight developments there on Rock Hill, and others here and there; I couldn't say, from the developments, how far it went, but was of opinion it dipped the way it started in; I inferred that it went as far as the next break in the limestone, but I couldn't tell how far east that would be; there were no developments to show that it was or was not near there; *nobody could say how far the vein went.*"

Hatheway (pp. 63–5) visited California gulch in 1877; the La Plata, Reddick, Rock and Dome had just been started; large amount of low grade iron ore disclosed in an open cut on the Rock; were taking ore of some kind from the shaft of the Reddick; knew Crown Point and Pinnacle in spring of 1877; saw

workings, a shaft being sunk, but no ore on the dump; saw Mr. Stevens and asked him "for information as to how to prospect, and he gave me a general idea how the limestone and porphyry formed, what his *theory* was, and how the mineral laid between it, and what he had got staked out through that country, and how extensive it would be. He said he thought it would be found over in the next gulch, which is Iowa gulch. He said it could be followed through on that contact clear to South Park."

On cross-examination by plaintiff, witness was asked the question whether, from the developments he saw, it was possible for Mr. Stevens to have known that Rock Hill was underlaid by a lode or mineral body, which question, being objected to by defendants, was ruled out as not proper, to which exception was taken by plaintiff.

The last witness, **Hallock,** (½ p. 65–7) knew the Rock and Dome with only small workings—small holes thereon showing some galena—in 1875; were worked and ore found between porphyry and lime, dipping generally to the east, was taken out in the summer of 1876, but without developments sufficient to show lime continuously; they worked a good many men on the Rock in 1877; knew Crown Point and Pinnacle in 1877 on which there was a shaft down 60 or 70 feet, *but not through the porphyry; examined the claims with reference to purchasing in December,* 1879, *and the shaft was then* 108 *or* 110 *feet deep and down to contact;* had a conversation with Mr. Stevens at the Rock and Dome in June or July, 1877, in which he explained "the big thing he had," showing the ground located north towards the Iron mine, and said they had all that ground located and had the outcrop on the same vein, which dipped to the east, and would hold it as far east as it went; had a conversation with Stevens and Wood in the fall of 1877 about the expediency of locating placer claims, which Stevens favored, but to which Wood objected because no water could be got on the hills; "I don't know exactly what Stevens said, but I know he advocated the thing. He said there was some valuable ground on Rock Hill and he wanted to locate it; that if it were located as a placer it could be done at a good deal less expense than by locating it in lode claims. He said the necessary work would have to be done on each lode claim—that is, five hundred dollars' worth of work in order to get a patent on it. He said we can use the gulch where it has been worked, and I remember he mentioned Eureka gulch and the workings there, to obtain the placer patent. He said he could take a larger quantity of ground with a good deal less expense than go at it

and locate it as lode claims." Witness was running a saw mill and getting his timber at the head of Georgia gulch in March, 1878, and had a conversation with Mr. Stevens about taking up the ground as placer and cutting him off from getting timber, in which Mr. Stevens said: "You can go ahead and cut what timber you want up there and say nothing about it." Speaking of the developments late in the fall of 1877, witness said: "I wasn't able to tell from the developments I saw there at that time anything about the extent or character of that vein. I don't pretend to be a geologist. I afterwards expended a large amount of money—some fourteen thousand dollars—trying to find ore on this same Pinnacle claim. I never found it in paying quantities."

The defendants next (pp.67-70), under objection and exception on the part of the plaintiff, gave in evidence certified copies of the location certificates of the Moyer, Thomas Francis Meagher, Pennsylvania, William Reddick, Summit, Nisi Prius, Gnesen, and Oro La Plata lode claims; a deed from the witnesses Deutro and Donath and others of the H. D. claim to William H. Stevens and Levi Z. Leiter, made on the 26th day of January, 1878; a deed dated April 29th, 1879, from Wells and Moyer to George E. Pease and others, of the ground within the placer known as the Leadville lode claim; and a deed, dated June 7th, 1879, from the same grantors to Burdell and Witherell, of a piece of ground in the placer known as the Gnesen lode claim.

A bond, dated September 24th, 1878, for a deed by Wells and Moyer to Hepburn and others, of the Leadville lode claim, and a deed from the plaintiff to the Nisi Prius Consolidated Mining Company of the property in controversy, dated October 6th, 1884, were received in evidence without objection.

Such were all the proofs offered or given by the defendants for the purpose of showing or tending in any manner to show that a lode or vein was *known* by any person to exist within the placer at the time of the application to enter the placer, or of the entry, or of the issuance of the patent.

To the testimony for the plaintiff in rebuttal but brief reference is required. That of the patentees, *Wells* and *Moyer* (pp. 72–9), was clear and positive to the fact that neither had any knowledge or information of the existence of any lode within the placer, nor of any without it, nor of the developments, strike, dip or character of any which led or could have led either of them to infer or believe that any outside lode extended into or would be found within the placer. And the validity and good faith of

their claims and possessory rights to the ground, by them regarded valuable as placer, was shown. It appeared from their testimony that, under rules and regulations early established by the miners of the district, they were claimants, and had been in possession of portions of the placer, working and improving the same as placer ground, from the year 1860, when gold was first discovered in California Gulch, down to the time of application for entry and patent, and that of other portions, comprising most of the ground constituting the placer, they were owners by purchase of other like placer mining claims to the number of one hundred or thereabouts, together with the improvements thereon, which claims and improvements had been made by other miners under the same rules and regulations and which, when purchased and consolidated, were known as the Wells and Moyer placer. It further appeared that to bring water upon the placer to wash out the gold, and which had been so used, they had constructed two ditches, one five and one-half and the other four miles in length, reaching the highest point of the placer; one of which ditches was conveyed to Stevens and Leiter with the placer. It was also shown that the agreement for the sale to Stevens and Leiter was a verbal one, and that after entry and conveyance Moyer worked a portion of the ground as placer under lease from Stevens and Leiter.

The testimony of Mr. Stevens ($\frac{1}{2}$ p. 79–80) was equally clear and positive that he had no knowledge and could not by possibility have had any of the existence of any lode or vein within the boundaries of the placer. Speaking of the indications from developments on the Rock, Dome and other outside locations, he said: "In the latter part of 1878 it came to be generally conceded that it was a contact vein having an apex or out-crop, and a line of strike nearly north and south, varying with the undulations of the surface of the country. At the time of closing the contract with Wells and Moyer for the purchase of this placer it was not known and could not be known to me or to any one else, until developments were made, what was the line of strike or the dip of the lode in the Rock. During the latter part of 1878 I became satisfied in my mind, and formed a theory as to the position of the lode. The whole surface of the country about the Wells and Moyer placer is covered with a deep alluvial deposit, and it was utterly impossible for any man to know what existed underground, and there were no developments to show it. I found my theory about it as most mining men do. There never was any out-crop or apex of any vein within the surface boun-

dary lines of the Wells and Moyer placer, and there isn't any shown or developed to-day." Again he testified: "My friends in Leadville came to me and wanted my opinion as it was at the time, and I was always careful to say that what I said was a theory or presumption, and was hypothetical entirely."

Four other witnesses (pp. 83–88) were examined for plaintiff, giving testimony to the character of the ground within the placer, that it was covered with wash as described by *Page*, with no surface indication of the existence of any lode or vein within its boundaries, and none shown by shafts sunk or development made from the surface, and that the workings on the outside claims, the Stone, A. Y., Rock, Domé, Pinnacle and Reddick, did not in March, 1879, show the strike or dip of any lode or vein existing in them.

Such is the substance of the entire testimony given on the trial. Following facts, supported by all the testimony and opposed by none, indisputably appeared.

In the Supreme Court

Of the United States.

OCTOBER TERM, A. D. 1887.

No. 960.

THE IRON SILVER MINING CO., Plaintiff in Error, vs. JOSEPH REYNOLDS and JOHN D. MORRISEY, Defendants in Error.	Error to the Circuit Court of the United States, for the District of Colorado.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the 23d day of March and the 11th day of April, 1878, Thomas S. Wells and William Moyer located a portion of the public mineral domain of the United States as a placer. Afterwards, and on the 11th day of March, 1879, a United States patent was issued to the said Wells

and Moyer for the ground so located, comprising 193 acres, more or less. The plaintiff in error, subsequently, by various deeds of conveyance, became the grantee of the locators and patentees of the placer.

This is an action in ejectment, brought to recover possession of the premises described in the patent, and the complaint, being the above mentioned placer. Complaint in ejectment was filed on the 7th day of May, 1884, by plaintiff in error against defendant in error, alleging an ouster by defendants in error, of plaintiff in error, from its possession of that part of the above mentioned tract of mining ground known as the Wells and Moyer placer claim in possession of the defendants, the fee simple title to which it claimed to hold.

On the 7th day of October, 1884, defendants in error filed their answer, denying the allegations of the complaint and setting up three affirmative defenses to the action. The first is a general denial. The second of said defenses alleges ownership, by defendants in error, of the Crown Point and Pinnacle lode claims, upon which they claimed a vein was found; which vein dipped in an easterly direction into and within the boundaries of the Wells and Moyer placer, and that they had the right to follow and work upon said vein into the territory of plaintiff in error, adjoining the Crown Point and Pinnacle lode claims.

The third of the defenses sets forth that at the time of the survey, entry and patenting of the Wells and Moyer placer there was "known to exist", to the patentees of the placer, within the boundaries of the placer, a vein or lode of quartz, or other rock in place, bearing gold, silver, etc., which, by virtue of its being "known to exist" to the patentees, at those dates, was exempted from the operation of the patent, and was not conveyed thereby; and that the patent contained a reservation to such effect; and that the trespass, of which, it was claimed in the com-

plaint, defendants in error had been guilty, was committed by them in working upon and extracting ore from a vein or lode of ore so "known to exist" to the patentees, which was excepted from the operation of the patent by the reservation clause therein contained. That the patent to the placer contained a reservation that the premises conveyed thereby might be entered by the proprietor of any vein or lode of quartz, or other rock in place, bearing gold, silver etc., for the purpose of extracting and removing the ore therefrom, should the same, or any part thereof, be found to penetrate, intersect, pass through, or dip into the premises by such patent granted.

On the 7th day of November, 1884, issue was joined by the filing of replication, by plaintiff in error. On the 18th day of that month, trial was had, which resulted in a verdict for plaintiff in error. The case was brought to this Honorable Court, on writ of error, and, by this Court, reversed. The case again came up for trial on the 22d day of January, 1887. Trial was had, resulting in a verdict for defendants in error. Motion for new trial was overruled on the 29th day of January, 1887, and the case is again before this Honorable Court, on a writ of error sued out on the 2d day of April, 1887.

Neither party to the controversy differ in their evidence as to the physical features of the territory in dispute. The evidence introduced by both (see pages 30–41, Record) shows that the Wells and Moyer placer is a tract of land lying along a hill side, having California Gulch on its north. Washings for gold have been made along its northern boundaries; and without the placer, lodes have been discovered, by their apices, to wit: the William Reddick, Stone, H. D., La Plata, Rock and Dome and others (page 40, Record). That the lodes so discovered have a very slight dip, or departure from the horizontal in their direction into the earth, to wit: about 15°. That this dip

is to the east; and that from its apex on the claims mentioned, *without* the boundaries of the placer, where it is found at the surface, it gradually disappears until where developments, made since the issuance of the placer patent, show it entering the placer, at a depth beneath the surface of 335 feet. (Page 36, Record.)

Defendants in error, working on the Crown Point and Pinacle claims since the issuance of the patent, encountered this vein at a depth of 108 feet (see page 35, Record); and following it on its dip have followed it into and within the boundaries of the Wells and Moyer placer, and claim the right to work the same within those boundaries.

ASSIGNMENT OF ERROR.

The errors assigned by plaintiff in error, and which are relied upon by it, includes errors committed by the court below, in admitting and refusing to admit certain evidence; and in refusing to give certain instructions asked for by plaintiff in error, and in the giving, of its own motion, of certain other instructions.

And are here set forth:

1. Because the court erred in admitting evidence as to the existence of lode claims in the vicinity of the Wells and Moyer placer, for the purpose of proving knowledge as to the existence of lodes within the placer.

2. Because the court erred in admitting evidence as to the existence of lode claims not located or discovered prior to July, 1878, when the entry was made of the Wells and Moyer placer.

3. Because the court erred in admitting evidence as to the mere staking and location of lode claims in the vicinity of the Wells and Moyer placer without first compelling the foundation to be laid by proof of the discovery of a lode within the boundaries of the claims, the staking and location of which was sought to be established.

4. Because the court erred in admitting testimony as

to the character of the ground patented as the Wells and Moyer placer.

5. Because the court erred in admitting evidence as to the existence of a vein within the boundaries of the Wells and Moyer placer, based upon developments and workings made since the issuance of the patent for the Wells and Moyer placer, to-wit: the 11th day of March, 1879.

6. Because the court erred in refusing to allow plaintiff in error to prove that the vein which defendants in error claimed was known to exist within the boundaries of the Wells and Moyer placer, at the date of the entry thereof, was one and identical with the vein which had been located by the grantors of plaintiff in error, without the boundaries of the Wells and Moyer placer, as the Stone, Rock and Dome lode claims, long prior to the location and patenting of the placer; and said vein was the property of the plaintiff in error at the date of the commencement of this suit, by virtue of the said Stone, Rock and Dome locations, and the possession of the apex of the vein upon those locations.

7. Because the Court erred in excluding evidence as to the existence of faults, or breaks or dikes across or by the side of this placer, breaking the contact into a number of different and separate veins, holding that it was immaterial whether those breaks, faults or dikes existed or not, and thereby preventing the identification of the particular vein which is claimed by defendants in error was known to exist prior to date of the issuance of the patent for the Wells and Moyer placer.

8. Because the court erred in admitting evidence of conversations had with Mr. Stevens relative to the existence of veins without the boundaries of the placer.

9. Because the court erred in admitting evidence of any conversations of any kind had with Stevens, or his expression of any ideas.

10. Because the court erred in refusing to allow plaintiff in error to show that the ground in controversy is not within the Crown Point and Pinnacle lode claims, belonging to defendants in error, and to show further that the workings did not pass into the ground in controversy upon any lode, or following any lode, the top or

apex of which is within the limits of the Crown Point and Pinnacle claims.

11. Because the court erred in refusing to charge the jury as follows: "The question for your consideration arises under that part of section 2333 which the Supreme Court has defined in this case as follows: 'But in case where the applicant for a placer patent is not in possession of such lode or vein within the boundaries of his claim, but such a vein is known to exist and is not referred to or mentioned in the claim or patent, then the application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim.'"

12. Because the court erred in refusing to charge the jury as follows: "Thomes S. Wells and William Moyer were the applicants for the placer patent in question, and their application to enter and patent the same was made on the 16th day of May, 1878. In their application and in their patent no lode or vein within the boundaries of their claim is mentioned or referred to as having been known to exist at that time. They applied for and obtained their patent, claiming that no lode or vein within the boundary of their claim was known to exist, and the principal questions in this case are whether in fact the patentees, Wells and Moyer, or Mr. Stevens, had knowledge of the existence of such lode or vein, and, if so, whether it is the same lode or vein from which plaintiff in this case, now the owner of the placer claim, seeks to dispossess the defendants."

13. Because the court erred in refusing to charge the jury as follows: "The lode or vein which, if known to the applicants, Wells and Moyer, it became necessary for them to include in their application, ought to be excluded from the possession thereof, must have been —

"*First.* A lode or vein the top or apex of which outcropped at the surface or was known to exist at some point below the surface within the boundaries of their placer claim.

"*Second.* It must have been susceptible of location by its top or apex upon the surface of the ground of the placer claim.

"*Third.* It must have been a lode or vein known to them at the time of their application for the placer patent, to wit, May 16th, 1878."

14. Because the court erred in refusing to charge the jury as follows: "The statute uses the words 'Where a vein or lode * * * * is known to exist within the boundaries of a placer claim.' By these words you are to understand such knowledge on the part of the applicants or placer patentees of the existence of such lode or vein as would have enabled them, had they so desired, to have made a valid lode location thereon within the boundaries of the placer, or to have made survey thereof so as to have purchased the same with twenty-five feet of surface-ground on each side thereof within the placer at five dollars ($5) per acre."

15. Because the court erred in refusing to charge the jury as follows: "A valid lode can only be made after the discovery of the vein or lode upon which it is made."

16. Because the court erred in refusing to charge the jury as follows: "A vein or lode of the kind here spoken of can only be known within the boundaries of a placer claim in one of two ways: either it must visibly outcrop within such boundaries, or such work and development must have been made within them as to have exposed a vein or lode below the surface of the placer."

17. Because the court erred in refusing to charge the jury as follows: "The court instructs the jury that if they believe from the evidence that the vein which it is claimed by defendants was 'known to exist' prior to the date of the application for the Wells and Moyer placer, has its apex or outcrop to the west of said placer, and on lode locations outside of the placer boundaries, and thence is one continuous vein, dipping into and under said placer, then the property and right of property in that vein belongs to the owners of the lode location upon which said apex or outcrop is found, provided such locations antedate the date of the inception of title to the Wells and Moyer placer; and only the owners of such locations can contest the right to such vein with the owners of the placer title, provided the end lines of their lode locations, when produced according to law, include that portion of the vein or which they claim, and which lies within the patented boundaries of the placer. If you find

as above and that defendants are not the owners of such a lode location, then the placer title must prevail and your verdict must be for plaintiff."

18. Because the court erred in refusing to charge the jury as follows: "The court instructs the jury that if you believe from the evidence that the lode which the defendants have sought to prove and claim, was 'known to exist' within the Wells and Moyer placer, at the date of the patent for the same, was 'known to exist' only by being exposed in workings situated on the lode claim without the boundaries of the patented placer, and that it has only been proved to dip into and 'exist' within the patented placer by workings and excavations made since the date of the patent for the placer, then and in that event such lode does not fall within the exception of said patent, which refers to lodes claimed or known to exist at the date of its issuance, and you must find for plaintiff unless defendants, who claim the right to work such lode within the patented boundaries of the Wells and Moyer placer, have shown as against the patentees of the placer and their grantees, that they (the defendants) were the 'proprietors' of such lode before the date of the issuance of the placer patent, by virtue of being the owners of a valid lode claim upon which the top or apex of such lode is found and the end lines of which, produced according to law, include that portion of such vein to which they, the defendants, claim title."

19. Because the court erred in refusing to charge the jury as follows: "The jury is instructed that a valid location of a placer claim operates from its date as a grant from the United States, and the ground located is, as long as the location remains valid, no longer part of the public domain. A patent is the highest evidence of a valid location."

20. Because the court erred in refusing to charge the jury as follows: "The court instructs the jury that the exceptions contained in the patent to the Wells and Moyer placer, in so far as the said exceptions relate to veins or lodes claimed or known to exist at date of said payment or at the date of the application for said patent, are only inserted in said patent for the benefit of the United States, and that advantage of such exceptions can only be taken by the United States."

21. Because the court erred in refusing to charge the jury as follows: "The court instructs the jury that the title conveyed by the patent to the Wells and Moyer placer, offered in evidence by the plaintiff, relates back to the date of the location of the Wells and Moyer placer in so far as it may be necessary to cut off intervening and all other claimants other than the United States."

22. Because the court erred in refusing to charge the jury as follows: "The jury are instructed that the terms 'vein or lode' and 'vein or lode claims', as used in section 2333 of the Revised Statutes of the United States, mean and refer to veins or lodes which have been discovered and have been developed and located and that have metes and bounds within the boundaries of a placer claim before the date when the application was made for placer patent; and unless the jury find from the evidence that such a claim was 'known to exist' within the boundaries of the Wells and Moyer placer at the date when the application was made for the Wells and Moyer placer patent, no other lode comes within the reservation clause in said patent which refers to lodes 'claimed or known to exist' at the date of its issuance; and, unless the jury find from the evidence that such a lode was discovered and located and is now owned by defendants upon that portion of said placer in controversy in this action, a verdict must be rendered for plaintiff."

23. Because the court erred in refusing to charge the jury as follows: "The jury are instructed that an attempt to locate a lode within the exterior boundaries of a placer claim at any time after the date of application for patent to the placer claim gives no right or title to such lode claim. A lode claim so located is not reserved from the grant of the placer patent. This rule applies to all lode claims located at any time after the application for the placer patent or the making of the entry or the issuing of the patent."

24. Because the court erred in refusing to charge the jury as follows: "The court instructs the jury that defendants have introduced no proof whatever that plaintiff was, at the date of the issuance of the patent for the Wells and Moyer placer, in possession of a vein or lode within the boundaries of the placer application."

25. Because the court erred in refusing to charge the jury as follows: "The jury is instructed that the discovery of a lode outside of the patented boundaries of the Wells and Moyer placer raises no presumption in the law of the existence of a vein or lode within the boundaries of the placer."

26. Because the court erred in refusing to charge the jury as follows: "The jury are instructed that the plaintiff has shown title in fee to the land in controversy in this action by a United States patent therefor and by deeds of conveyance from the patentees to the plaintiff and its grantors."

27. Because the court erred in refusing to charge the jury as follows: "The jury are instructed that the date of the inception of plaintiff's title in fee is the date when the application was made for the placer patent, which is shown by a certificate of the register and receiver of the United States land office at Leadville, Colorado, to be the 16th day of May, A. D. 1878."

28. Because the court erred in refusing to charge the jury as follows: "The court instructs the jury that the locator of a mining claim such as the Wells and Moyer placer has, after his location, which, by the issuance of a patent, is proved to have been valid, the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and that any entry made upon such location for the purpose of initiating an adverse title to that of the locator is a trespass, and such title so initiated is absolutely and entirely void and of no effect. The successors in interest of the locator have all the rights and privileges of the locator."

29. Because the court erred in refusing to charge the jury as follows: "The jury is instructed that a placer claim need not necessarily contain gold in alluvial deposits, but that under the law any mineral land which is not known to contain veins of quartz or other rock in place is placer, and title to such land can only be acquired by compliance with the laws relating to the location of placer claims."

30. Because the court erred in refusing to instruct the jury as follows: "The jury is instructed that the definition of what constitutes a placer given by the statutes of

the United States is: 'Claims usually called 'placers' include all forms of deposits except veins of quartz or other rock in place.' The vein of quartz or other rock in place alluded to are veins known to exist at the date of the application for patent for the placer."

31. Because the court erred in refusing to charge the jury as follows: "The jury is instructed that though a small segment of the top or apex of a lode is shown within the Crown Point location it extends not with the length of the location, but across it, so as to convert the side lines of the claim into end lines and to limit the direction in which it may be pursued to the space enclosed by these lines. The place in controversy is not within the side lines of either defendants' Crown Point or Pinnacle claims, nor within the extension of those lines. The defendants have, therefore, failed to prove any title to the place in controversy by virtue of the possession of the apex of any vein."

32. Because the court erred in refusing to charge the jury as follows: "The jury is instructed that under the evidence any speculative theory formed at the date of the issuance of the patent for the Wells and Moyer placer from the fact that at that date discoveries of a vein or veins had been made outside the placer boundaries, that such vein, so discovered, ran into the placer, was and could only have been the merest surmise. Belief in such theories (no matter how correct they may be proved by subsequent development) is not under the law evidence of that knowledge of the existence of a vein required to bring such vein within the second exception of the patent."

33. Because the court erred in refusing to charge the jury as follows: "The jury is instructed that the veins or lodes mentioned in the second exception of the patent for the Wells and Moyer placer mean veins or lodes 'known to exist' within the boundaries of the placer claim at the date of the issuance of the patent; that the exception does not refer to veins or lodes parts of which may be found subsequent to such date, dipping into the placer at greater or less depth beneath its surface."

34. Because the court erred in charging the jury as follows: "Le Conte says (page 232): 'If a mountain

slope, along which out-crop auriferous quartz veins, be subjected to powerful erosion by water currents, then in the stream beds will be found gravel drifts, composed partly of the country rock and partly of the quartz vein stone. Among the gravel will be found particles of gold, washed out from the upper parts of the veins. By the sorting power of water the heavy gold particles are apt to accumulate mostly near the bed of the gravel deposit (bed rock). These gravel deposits are the placers. In these the gold particles, like the stone fragments, are always rounded and worn by attrition.' (Page 555): 'The placers of California, however, are of two kinds, viz., the ordinary or superficial placers and the deep placers. The superficial placers are gravel drifts in the present river beds. The deep placers are gravel drifts in old river beds. These old river beds, as already stated (pp. 232, 529), are in many cases covered up with lava. In some cases the general direction of the old bed coincides with that of the present river system, but more commonly the present river system cuts across the old river system. In all cases, however, it is evident that the old river gravels were formed before the lava flow and the new gravels after the lava flow. In all cases, also, the present river system has cut down far below the old beds, in this respect entirely different from the old river beds of the eastern portion of the continent.'"

35. Because the court erred in charging the jury as follows: "Speaking of superfical deposits, Whitney says (page 34): These comprise all deposits of mineral metals and their ores which lie loose upon the surface or intermingled with the superfical formations, the drift and the alluvial. They are made up of particles and rounded fragments which have originally formed a part of some bed or vein and from which they have been detached by various causes similar to those which have produced the great masses of clay, sand and gravel which almost everywhere cover the rocks in place. Some metalliferous deposits are usually called 'Washings' or 'stream-works.'"

36. Because the court erred in charging the jury as follows: "Such a deposit existing commonly in the alluvium of streams and along their courses, and often on the sides or elevated plateaus of the mountains, in the loose material of the surface are easily distinguished from a

lode or vein, which is a body of ore or mineralized rock in the general mass of the mountain."

37. Because the court erred in charging the jury as follows: "When they are associated with a lode or vein in the same territory the placer is on the surface of the rock which forms the matrix of the lode or vein. The bed rock of the placer becomes the dividing line between the two deposits, and they are distinguishable in elevation as in other characteristics already mentioned."

38. Because the court erred in charging the jury as follows: "As to each form of deposit provision is made in the act of Congress for acquiring title from the government, but the quantity of land which may be taken in a placer location is much larger than that which may be acquired in a lode location, and the proceedings for acquiring title differ in some particulars, to which it will be necessary to refer in detail."

39. Because the court erred in charging the jury as follows: "It is, however, provided in section 2333 of the Revised Statutes that in an application for patent for a placer claim, when a vein or lode is known to exist within the claim, the application shall be made with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provision of this chapter, including such vein or lode."

"And where a vein or lode is known to exist within the boundaries of the placer claim, application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

"The effect of this section is to exclude from the operation and to exclude from the grant of a patent for a placer claim any vein or lode the existence of which was known to the patentee at the time of the application for the patent, so that such vein or lode remains the property of the government or of any citizen who may have acquired

title to it in the same manner and to the same extent as if the grant had not been made. In other words, as between the patentee of the placer and the government or other claimants of the vein or lode, it is in the same situation as if the patent had not been issued."

40. Because the court erred in charging the jury as follows: "In this instance the existence of a lode at the point in controversy under the placer seems to be denied by plaintiff's counsel, but there is nothing in the evidence to support that denial. That there is a body of ore with defined boundaries in the general mass of the mountain in that locality is sufficiently established, and the case turns upon the point whether its existence was known to Wells and Moyer or to Stevens at the date of the application for patent."

41. Because the court erred in charging the jury as follows: "It is shown in the evidence that Wells and Moyer, in making the application for patent, were acting as the agents of Stevens and Leiter, their grantees, the latter having purchased from them before the application was made; and therefore it is sufficient if it appear that the existence of the lode was known to Wells and Moyer or to Stevens or to all of them at and before the time of the application for patent. Was it known to them or any or all of them at that time; and if known, how known? What means of knowledge must the parties have had to charge them with the notice of the lode?"

42. Because the court erred in charging the jury as follows: "Counsel for plaintiff contend that they must have ascertained by actual exploration within the limits of the placer that the lode existed there, or that there must have been an outcropping of the lode within the limits of the placer which could be seen by all observers; but such rule would be unreasonable and wholly defeat the intent of the statute."

43. Because the court erred in charging the jury as follows: "In this instance it seems to be unnecessary to declare what circumstances may be sufficient to affect a patentee with knowledge as declared by the statutes; for, if in any case it appear that an application for a patent is made with intent to acquire title to a lode or vein which may exist in the ground beneath the surface of a placer,

it is believed that a patent issued upon such application cannot operate to convey such lode or vein."

44. Because the court erred in charging the jury as follows: "That intention could be formed only upon investigation as to the character of the ground and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute."

45. Because the court erred in charging the jury as follows: "If we look to the circumstances developed in the evidence we shall find that they tend strongly to the conclusion that the application in this instance was of that character. Wells and Moyer were placer miners in California Gulch and in Eureka Gulch long before Mr. Stevens and his associates acquired title to the premises. Their operations had been confined to California gulch and to Eureka gulch and some slight explorations on the hillside. Upon the purchase by Mr. Stevens and his associates the claims were extended in a westerly and southerly direction to a great distance and over territory which had not been before that time occupied for placer mining, and which apparently contained no placer deposits. Mr. Stevens and his associates were in search of lode locations, silver bearing lodes, and a metal which is not found in placer ground."

46. Because the court erred in charging the jury as follows: "Von Cotta says (page 505): 'Surface deposits from which silver is extracted are not known, nor do they probably exist.'"

47. Because the court erred in charging the jury as follows: "Why was this done? The intentions of Wells and Moyer and Stevens are said to have been expressed at the time. If they were so expressed, did they state the truth? If not, what is the fact in relation to the matter? What was the intention of the parties in making this application and securing this patent? If, upon the evidence you say it was to acquire title to the lode or vein in controversy, the patent will not operate to convey such title. If, on the other hand, the application was made in good faith, with intent to acquire the premises as placer ground only and without knowledge of the existence of any lode in the premises, the patent will operate to convey such title."

48. Because the court erred in charging the jury as follows: "If the application had been limited to California and Eureka gulches, and some reasonable space adjacent thereto, which it might be supposed contained such valuable deposits as had been worked out in the gulches, no questions could arise in respect to the matter, but when the outlying territory beyond these gulches, which contains nothing in the nature of a placer deposit, and is apparantly valuable only for ores and minerals which may be found beneath the surface within the country rock in the form of veins or lodes, is embraced in such application, what shall be said as to the purpose of putting in such outlying parts?"

49. Because the court erred in charging the jury as follows: "The conduct of the parties, quite independently of any intention by them expressed, may be the subject of reasonable presumption and inference, and if it appear to you that the purpose was to secure such lodes or veins as might be found on the mountains within the limits of the placer claim, such purpose cannot be effected in any such way.

"Any attempt to pervert the statute and take the lode in a manner not authorized by law cannot be upheld."

50. Because the court erred in charging the jury as follows: "If you believe from the evidence that at the time Thomas S. Wells and William Moyer applied for patent to and entered the Wells and Moyer placer claim, they were doing so for the benefit and at the instance of William H. Stevens and Levi Z. Leiter, and by reason of agreement with said Stevens and Leiter to purchase the same, and that the said Stevens and Leiter paid all the expenses attendant upon the location, patenting and entry of said placer claim, receiving therefor a deed shortly after said entry was made, then you are instructed that the act of the said Wells and Moyer was the act of said Stevens and Leiter, and the knowledge of said Wells and Moyer, and either of them, was the knowledge of the said Stevens and Leiter."

51. Because the court erred in charging the jury as follows: "And you are further instructed that if you believe such an arrangement and agreement was made, then, even though said Wells and Moyer should have been ignorant of the existence thereof, yet if the said

Stevens knew the same to exist, neither he nor the plaintiff could in anywise shield themselves behind the lack of knowledge on the part of said Wells and Moyer or either of them."

52. Because the court erred in charging the jury as follows: "You are further instructed that the plaintiff must recover upon the strength of his own title and not upon the weakness of that of his adversary. Whether the defendants have any title or not to that part of the deposit of which they are in possession under the Wells and Moyer placer claim, becomes immaterial unless the plaintiff can show some better title thereto, and if you believe from the evidence that the said Wells and Moyer or William H. Stevens knew before the date of their entry in the land office that the said vein or deposit underlay the said placer claim, then you are instructed that the same did not pass to them by the said patent, and they, having no title thereto, cannot complain because the defendants are in possession, since their trespass cannot be a trespass against a person having no title. In such case the lodes or veins known to exist when a patent is asked for are excluded from the ground as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land and his placer mine and such lodes or veins of mineral that are within it as were unknown, but to such as were known to exist he gets by that patent no right whatever."

53. Because the court erred in charging the jury as follows: "The title remaining in his grantor, the United States, to this vein the existence of which was known, the plaintiff has no such interest in it as authorizes it to disturb any one else in the peaceable possession and mining thereof. When it is once shown that the vein was known to exist at the time the title was acquired to the placer, it is shown that the patentee had acquired no title or interest in that vein by his patent. Whether the defendants, therefore, have any title or are mere trespassers is immaterial. It is certain that they are in possession, and

that is a sufficient defense against one who has no title at all and never had any."

ARGUMENT.

The questions presented for decision, by the record and assignment of errors, involve the consideration of nearly the whole of the Mining Law of 1872, but more especially of Sections 2320, 2322, 2329 and 2333. In view of the fact that the Court below seems, throughout the trial of the case, and throughout its instructions, to have been under the impression that a "placer", under the laws of the United States, must and could only be ground containing free gold in alluvial deposits, counsel begs leave to preface his argument by referring to the mining laws, in their bearing on "placers".

In the spring of 1872, Congress found itself face to face with the necessity of amending or changing the laws, at that time controlling the mineral lands of the country. The statutes then in existence, or a majority of them, had been found to be both defective and unsuited to the existing conditions. After much work, by a special committee, composed of men peculiarly qualified by virtue of their knowledge of the conditions existing among miners of the western States and Territories, a bill was passed, now known as "The Law of 1872". The first clause of that bill, now known as section 2319 of the Revised Statutes of the United States, is worded as follows:

"All valuable mineral deposits, in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States, and those who have declared their intentions to become such."

Here, then, is the declaration by Congress that *all*

valuable minerable deposits in *lands belonging to the United States*, regardless of their character, are open to occupation and purchase, and that the government is willing to part with its title thereto. The law then describes of what a mining claim upon a vein or lode of quartz, or other rock in place, shall consist, whether located by one or more persons, to wit: It shall not exceed more than three hundred feet in width on each side of the middle of that vein at the surface, nor shall it exceed fifteen hundred feet in length along the vein. The law then provides, among other things, that the locator of such a claim, or of any valid mining claim, shall have the *exclusive* right of possession and enjoyment of all the surface included within the lines of his location, and of all veins, lodes and ledges throughout their entire depth, etc., and that the miners of each mining district may make rules not in conflict with the laws of the United States, or with the laws of the state or territory in which the claims may be situated.

Section 2325 provides the method of obtaining patent to any land claimed and located for valuable deposits, either lode or otherwise, but not one word has so far been said in the statutes relative to "placers," or the class of claims thereinafter described as "placers." It is not until section 2329 is reached, which is part of an act passed July 9, 1870, consequently prior to the act of 1872, that we encounter any mention of the only other class into which mineral lands have been divided, making the two classes, "lode claims" and "placers." Congress seeing fit to place veins of quartz, or other rocks in place, in one category, and all the other mineral deposits in another; and, unfortunately for plaintiff in error, designating the latter class "placers," presumably for the want of a better name. But it was so careful that it should not be misunderstood, that section 2329 reads as follows (the

italics are counsel's): "Claims usually called 'placers,' including all forms of deposits, excepting veins of quartz or other rock in place * * * shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims." Mark the wording: "Claims usually called 'placers.'" First, the use of the word "claims," meaning the other branch of claims for which it intends to provide. Then, for want of a better name, the "usually called 'placers,' including *all forms* of deposits," intending thereby to offer for sale and to sell any and all mineral deposits under one classification or the other, knowing that it could not, with the limited acquaintance it had of the country, pretend to classify the lands more closely, and wanting to dispose of all of them, it made the two simple classes, the lodes on the one hand, and every other mineral deposit on the other, calling one "lodes," and the other "placers."

Further distinctions have been attempted on the ground that the land must be valuable for minerals. This is a matter utterly impossible to determine beforehand. A lode may be located and worked for years before it may develop value of any kind. A man could not be deprived of his right to acquire title to that lode, because at the time he sought to acquire it he could not ship the ore or make money from it. The argument applies equally well to the other class of mineral claims. It is not necessary that it should be demonstrated by the locator of any mineral deposit that it has value at the time of his appropriation. If he sees in the land value enough for him to afford to pay the government for it, and acquire title to it under the law, it is sufficient enquiry for the government to make. It should no more ask him to demonstrate its present commercial value than it should in the case of a lode, because the possibilities of its en-

hancing in value, as a result of his labor, as the years roll by, are the chances for which he pays the government when he buys the property, and these chances it is perfectly legal for him to take. The government is benefitted instead of injured by it, by receiving its money, in advance, for the land, at a time antedating that when the enhanced value of the property would make it marketable and worth while for somebody to take the same. The intention of congress was to part with the title to all its mineral lands to any person who would comply with the law, and consider the lands of sufficient value to pay the government for them.

It is peculiarly unfortunate for plaintiff in error that congress has used the word "placers," in connection with the second class of mineral claims. The plain statutory definition of congress, set forth in section 2329, has, as a result, been totally and entirely disregarded, especially by the people at large. They have narrowed the definition to that of the Spanish word, which is identical, and which means simply a deposit of free gold in alluvial gravel. Had the two classes been designated as "Class A." and "Class B." instead of "lodes" and "placers," it would be almost safe to predict that the class of litigation, of which this case is typical, would never have arisen. Certainly the instructions given by the court below in this case would never have been given. The department of the interior has certainly understood and always executed the law as counsel has interpreted it, that is, that there are but two classes, "lode" and "placer." The department has patented as "placers" mineral lands said to contain diamonds, bog iron, potash, borax, mica, fire clay, kaolin, marble, slate, ochre, umber, coal oil and a number of other mineral deposits which counsel does not now recall.

Sickels, page 485, *et seq.*

It is, therefore, evident that a "placer" may contain any kind of mineral and other deposit (Secs. 2329-2333), and is not confined to one definition of land containing free gold in alluvial soil. This much to show that if a patented mineral claim, though designated by the patent as a placer, does not contain gold, the fact cannot be held in any way to impeach the *bona fides* of the location.

To proceed to the consideration of the bearing of section 2320 upon the case, counsel quotes the statute in order that a more convenient consideration of its contents may be had:

"Mining claims upon lodes or veins of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal but shall not exceed one thousand five hundred feet in length along the vein or lode, but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other."

This section describes fully and completely what class of mineral deposits Congress intended should be known as lode claims. It must contain a lode of quartz or other rock in place bearing gold, etc. By complying with certain laws the discoverer can have, of this class of mineral land, three hundred feet on either side of the vein which he may discover, and fifteen hundred feet along the length of such vein; but can make "no location of

a mining claim * * * * * * without the discovery of a lode or vein within the limits of the claim located;" he can, however, make any number of locations. In other words, he must first discover his vein before he has any right to make the first step towards the location of any portion of lode mineral land. This has been decided by this Honorable Court so many times that it is unnecesssary to again call the attention of the court to it.

It is this class of claims, that is, a claim preceded by a discovery, followed by the proper and legal acts of location, to wit: the posting of notices, staking and recording, to which section 2333, which I now quote, refers.

"SEC. 2333. Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode; and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The clear intention of Congress, as shown by all its mining statutes, was to make the acquisition of title by the prospector as easy as possible. This section is no

exception to the rule, and provides that where a placer claimant is in possession of a lode, that is such a mineral deposit as should properly be classified under the other class of claims, he shall not be put to the expense or trouble of obtaining one patent for the lode and another for the placer, but that he may apply, at one and the same time, for both classes of ground, and receive one patent for both in lieu of two. Congress further recognizes that if the prospector possesses the surrounding ground as a placer, he will not require the ordinary three hundred feet on either side of the lode as an incident to the vein, because he already owns it as placer and should not, therefore, be required to pay for it at a larger price than its classification would call for. Congress therefore reduces the ground, for which he must pay the higher price, to a minimum, to-wit: Twenty-five feet on either side of the vein to which he desires to obtain title, knowing full well that veins, often, themselves exceed fifty feet in width.

Still following out the idea of making it easy to obtain patents, Congress further provides that where such a vein as is described in section 2320 is known to exist within the boundaries of a placer, an application for a patent for such placer, which does not include an application for the vein or lode claim, shall be considered as a conclusive declaration that the claimant of the placer has no right of possession to the vein or lode claim. In other words, it is not necessary for the claimant of the placer to go to the expense of cutting out of his survey any vein or lode claim, which is already known to exist, and which is *owned* and *located* and *claimed* by some other person, but he may run his lines around said lode claim, and the very act is in itself a declaration that he claims no right of possession of that portion of the public mineral domain already appropriated by some other person by virtue of

the discovery of a vein and the location of the same by such person.

The theory upon which the whole mining law is constructed is, that all veins are discovered by their top, apex, or outcrop. It is such a vein that section 2333 has in contemplation, namely, a vein, the top, apex, or outcrop of which occurs *within* a placer. It is a vein or lode, which, if not located already, is susceptible of location. It is a vein or lode, the strike of which can be discovered in order that the prospector may know in which direction to locate his 50 ft. strip and the width of which can be ascertained, so that the center can be found, in order that from that center twenty-five feet on either side can be measured. It is a vein or lode *within the placer boundaries* which is in possession of the placer claimant, or, which, if not in *his* possession, has been discovered, staked, claimed and located by some other person.

That there might afterwards be discovered veins or other deposits in a placer, which had not been discovered, or claimed, or located at the date of the application for the patent, Congress fully realized, and in the same generous spirit provides, in this section, that a patent for a placer claim shall convey the title to all such lodes or other deposits to the patentee of the placer. It is only such a lode as has been mentioned which is excluded from the operation of the patent, and which falls within the reservation of the same. Congress does not ask that impossibilities shall be performed in order that citizens may avail themselves of its grants. It would be absurd to suppose that the claimant of that class of mineral land known as "placer" must examine the country surrounding his claim, the course and direction of veins discovered *without* the boundaries of his placer claim, perhaps within a radius of miles, and make surveys and undertake to ascertain the course or direction in which veins

in the vicinity may dip or strike. In his application for his patent for his placer must he set forth that James Smith has discovered or located a vein a half mile distant from the northern boundary of his placer, and that from the developments made by Smith he believes that Smith's vein dips toward his placer, and that if it continues in the direction of its dip for the half mile which intervenes between Smith's claim and the applicant A's, it will, undoubtedly, dip into his placer, and that he verily believes it does so dip. That in order to acquire title to the same "A" desires to apply for twenty-five feet on either side of that vein which he believes enters his placer at a depth of some seven hundred feet from the surface. Or, that in the second case, Jones on the south of "A," at a distance of a mile, has located a vein which, on its strike, undoubtedly, if it continues in the direction which it appears to have, will pass into his placer, but which, after due diligence, he has been unable to find *within* his placer, because of the extraordinary amount of wash and gravel of, say, four hundred feet in depth, which covers the apex of Jones' vein, where, if continuous, it passes on its strike into his placer, thus making it a blind vein. Yet he is desirous of obtaining title to such vein where it crosses his placer claim, in case it does cross the same, and wants to take up twenty-five feet on either side of it.

Is it not impossible in the first case, where Smith's vein passes on its dip into the placer territory, for "A" to locate twenty-five feet on either side of the vein which has its apex on Smith's claim, a distance of a half mile off? What good would it do him to locate it? It is not susceptible of location, if it is already located by Smith by virtue of his discovery of its apex. It is owned by Smith wherever it goes into the center of the earth, within his produced end lines, which, suppose in this case, take in the ground sought to be located by "A". If

not included by Smith's produced end lines it is legally another vein and passes to "A" as an unknown vein. A's location of the vein, on its supposed dip within the placer would be a farce. Equally so would the location of the vein in controversy in this action on its dip where it passes into the Wells and Moyer placer have been a farce had Wells and Moyer attempted it. For was it not and is it not a vein already owned, by virtue of its discovery, and the location of its apex *without* the boundaries of the placer, on the Rock, Dome, Stone and other claims, owned by other parties. If not included within their produced end lines it is legally another vein and could not be legally known by the discovery of those veins. No good could have come of such a location and no legal location or claim could have been made by any number of surveys of strips fifty feet in width, anywhere along the placer, or within its boundaries.

Equally foolish would it be for "A" to have attempted to locate Jones' vein, no matter how strong his belief that its strike extended within the placer. If the placer, at the point of intersection with the vein, is covered by wash to a depth of, say, four hundred feet, he could not be expected to sink through that wash, shaft after shaft, in order to determine the exact direction of the strike of the apex of Jones' vein. He might sink a number of shafts and ultimately find that the vein had been cut off between his and Jones' location by dikes and faults—that it did not really extend and strike into his placer at all. The amount of money required to sink even one shaft through that amount of wash would probably preclude him from sinking it. After years of development, and after the patenting of the placer, Jones by making location after location, as his developments indicated the course of the vein, would finally reach, with his locations, the placer, cross its line from his workings in that

direction, and mine under the placer on the same identical vein which was located and discovered prior to the date of the application for the patent, at a distance of a mile from the placer ; and, when "A" seeks to eject him therefrom, he replies to "A" that there are clauses in his, "A's" patent, excepting veins known to exist at the date of its issuance from the operation of the patent—"the vein upon which I am working is the same identical vein which I had discovered prior to your application for patent, and of the location and discovery of which you knew because you made surveys to ascertain the direction of its strike, prior to the date of the application for your patent, and, therefore, it is excepted from its operation. I claim it by virtue of my right of possession. My men are in there working and I propose that they shall stay there." "A" says, "It is true, I knew that the vein existed on *your* location, but I didn't *know*, and no one could know that it existed within my placer boundaries, in any shape. The intention of Congress was to grant to me all veins not known to exist at the date of my application, and, as I say, this one could not be known."

Is "A" to be taxed with knowledge under such circumstances and deprived of his property by reason of it? If so, at what point or distance from the boundaries of the placer does knowledge end? Suppose it be a vein like the Comstock, ten or fiften miles in length. Is a discovery at one end of that vein sufficient to tax a placer owner at the other end with the knowlenge of its existence within his placer, if ultimately the vein be followed and worked until it reaches the placer? May not the limit be extended even to twenty miles or more? Counsel can understand how and why Congress has sought to protect a *bona fide*, legitimate owner of a valid lode claim, located *within* the boundaries of a placer, prior to the date of application, by making it unnecessary for him

even to adverse or protest against any attempt to obtain title to the other class of mineral lands surrounding him, as well as by making it unnecessary for the applicant for that class of land to exclude from his survey, or his application for the patent, the ground already appropriated as a lode claim by virtue of the discovery of a lode within it. The interests cannot possibly clash. The placer claimant's patent shows to what he is entitled. The records of the county show the date of the location and the discovery of the lode claim. The vein on the claim speaks for itself, and all interests are preserved entirely separate, and justice is done to both. On the other hand, if the mere existence of a lode, proved by a discovery *without* the boundaries of the placer and in the vicinity thereof, is evidence in any form of the existence of that vein *within* the boundaries of the placer, either upon its dip or strike, then the question may never bever be settled and the title never quieted.

It may be only after miles of drifts and levels have been run that the placer claimant may find that the vein upon which he is working is identical with a discovery made half a mile from his boundaries prior to the date of the application for patent. Is he at once deprived of all right to this vein by virtue of the fact that he knew of the existence of that discovery in the vicinity and had seen the vein disclosed by the workings at that point of discovery, and this regardless of the fact whether the discovery was made on the apex or upon the dip of a vein, and of the fact that the vein within the placer is not and cannot be claimed by virtue of the possession of an apex, because the end lines produced do not include the placer? Then any stranger may come and entering his placer by means of underground passages may work this vein, which is now shown to exist within the placer, and which the stranger will claim is not the property of the placer

patentee because it was known and exposed, at a distance from the placer, prior to the application for patent for the same.

Opposing counsel, throughout the trial, ingeniously endeavored, by following the wording of the second excepting clause in the patent, which differs from section 2333 in using the word "claimed," to make it appear that if a lode were claimed, by the community in general, at the time of the application for a patent for the placer, to exist within the placer, or that it were a hereditary tradition handed down from the grandmothers of the community that such a lode existed within a certain property, afterwards appropriated as a placer, it would be sufficient to reserve, from the operation of the patent, any lode which might be found therein, because it had always been claimed by the community that a lode did exist there.

There must be some definition given to the statute that will not only interpret the intention of Congress, but will serve for all time to quiet the titles acquired under placer patents. It must not be a definition that will forever leave the matter open to the assertion of title by any person that he is working on a vein within the boundaries of the placer which was known to exist at the date of the application for patent therefor. Who by such bare assertion can obtain standing in court and be permitted to sustain his claim by testimony that it was known by one man at a distance of half a mile from the boundaries of the placer—that another man's father had told him that he had discovered it within the boundaries of the placer; that it was claimed by the community that it extended into the placer, and that all this happened prior to the date of the application for the patent for the placer. Would not such a definition as this latter place any grantee of the placer patentee in the position of having constantly to defend his title against any man who may

choose to make such assertions and attempt to prove them by evidence of the kind above mentioned? Would not such a definition bring about the state of things which Justice Field in the case of the St. Louis Smelting Company vs. Kemp, 14 Otto, 636–657, deprecates, as follows:

"It is this unassailable character which gives to it (the patent) its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its rulings upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion the title whereof rests upon the same facts, because another jury came to different conclusions. So his rights in different suits upon the same patent would be determined not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."

It is true that this case is not a case of collateral attack upon a patent, but the intention of this kind of action is to limit or define the grant made by the patent, before a jury, or various juries. First, by prejudicing the mind of the jury by showing, that the ground included in the placer patent is not considered, by a few men who are introduced as witnesses, to be a particular kind of placer ground, or rather to come within the popular definition of placer ground. Secondly, that there is, without the boundaries of the placer, a lode which was discovered and known, and *claimed* to exist by the community, prior to the date of the application for the placer patent, and that the same lode is found within the placer boundaries to-day, and is therefore excepted from the operation of the placer patent. One jury may believe such evidence

on a certain portion of the placer. Another jury may refuse to believe it and so, our rights under the patent will be left to the varying prejudices of juries, to limit or extend. A definition, therefore, must be given which will quiet the title, and one which will remove the question entirely from the fluctuating prejudices of different jurymen; and from the effect of evidence often dictated by the interest of the witnesses giving it. Such a definition has been furnished by Judge McCrary, in the case of a so-called lode against this very placer. The decision is that of The Iron Silver Mining Company vs. Sullivan *et al.*, 16th Federal Reporter, 829. It was made on a demurrer to the complaint. Judge McCrary sustained the demurrer and the case was brought on a writ of error to this Honorable Court, and reversed in the case of Sullivan *et al.* vs. The Iron Company, 109 U. S., 550; this Honorable Court holding that the complaint was good. This Court did not in its decision give a definition of the words, "known to exist" as used in section 2333, so that Judge McCrary's definition of those words may still be considered an authority and a high one. He says the words vein or lode known to exist, as used in section 2333, "will be held to mean a vein or lode that has been discovered; that has been developed or located, and that has metes and bounds" at the date of the application for placer claim. How clearly and definitely this settles the patentee's rights. It leaves to record evidence the whole matter. He is put on his guard and informed by the records, at the date of the application for his patent, what he takes by his patent. He cannot, afterwards, plead ignorance; neither can an adventurer produce suborned witnesses, and introduce evidence of the opinions of individuals or of communities as to the existence of any particular vein or of some vein within the boundaries of the placer. The whole matter is settled with justice to

both parties; litigation is avoided and the rights of the patentee are no longer subjected to "constant and ruinous litigation."

Judge McCrary's view of the case has been adopted by the Supreme Court of Montana in the following cases:

Mantel vs. Noyes (Montana) 5th Pac. Reporter, 861;

Raunheim vs. Dahl, 9th Pac. Rep., 892.

The right of the owner of a location, made upon a vein discovered *without* the boundaries of the placer, can in no manner be prejudiced by the definition above set forth.

It is provided by the 3d excepting clause in the patent, which is justified under the law, in words as follows:

"That the premises hereby conveyed may be entered by the proprietors of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, for the purpose of extracting and removing the ore from such vein, lode or deposit, should the same or any part thereof be found to penetrate, intersect, pass through, or dip into the mining ground or premises hereby granted."

The owner of a lode properly located upon the apex may follow such lode, within his end lines produced, on its dip, into the earth, even though the same should pass or dip into the placer. There is no hardship in this. Nothing but simple justice. The law gives the discoverer the vein wherever it goes towards the center of the earth, between his end lines produced. This right accrues to him at the moment he locates his claim, and no subsequent location of a placer or lode can deprive him of the right, so long as he keeps his location alive. There is, however, a limitation, and that is that he must be the "*proprietor*" of the lode claim, at the date of the application for the patent for the placer claim. This, by virtue of the fact that the location of the placer claim carries

with it the right, under section 2333, to "all valuable mineral and other deposits within the boundaries thereof." Should a subsequent locator to the placer, by virtue of a lode claim located *without* the placer, *after* the date of application for patent for the placer, seek the right to enter the placer by virtue of his apex, the exercise of such right would be a trespass upon the placer owner, who has already received a grant from the government to all valuable mineral and other deposits within the boundaries of his placer.

Pacific C. M'g Co. vs. Spargo, 8 Sawyer, 645.

Passing to the consideration of the assignments of error:

First assignment of error is the admission by the court of evidence as to the existence of lode claims in the *vicinity* of the Wells and Moyer placer, for the purpose of proving knowledge as to the existence of lodes *withtn* the placer. (See p. 30, div. 52, record.)

This evidence is clearly not allowable and cannot in any way establish or tend to establish the existence of veins or lodes, or vein or lode claims *within* the boundaries of the placer. It is almost like attempting to establish the competency of a witness as an expert musician by proof that for ten years of his life he had lived next door to Mozart. Accepting the definition of the court below, that a placer must contain gold in alluvial soil, and the court's further assertion, by its citation from Whitney, that "such metalliferous deposits have originally formed part of some bed or vein," it necessarily follows that in the vicinity of every gold placer there must be some vein whose disintegration has produced the placer in its vicinity. If such evidence is admissible, every gold placer may be proved to be not a placer by proof of the existence of the vein in the vicinity which

created it. That other courts have not considered that the existence of a vein in the vicinity of a placer raises any presumption of its existence, in part or whole, within the placer, see

Raunheim vs. Dahl (Montana), 9th Pac. Pep., p. 892.

Second assignment is to the admission of evidence of the location of lode *claims* in the vicinity of the placer, not located or discovered prior to July, 1878, when the entry of the Wells and Moyer placer was made. (See p. 31, record.)

The time when, according to section 2333 of the Revised Statutes, a lode must be known to exist so as to take it out of the operation of the placer patent, is as clearly expressed by that section—the date of the application for patent for the placer. Evidence, therefore, of lode locations not made even at the date of the *entry* of the placer patent, which must be at least sixty days later than the date of the application for the patent, is clearly inadmissible; especially is it inadmissible when it is shown that such lode claim is not located *within* the boundaries of the placer patent, and when the evidence is introduced for the purpose of proving the existence of a vein within the placer.

Third assignment is the admission of evidence as to the existence of mere lode claims in the vicinity of the placer without first compelling a foundation to be laid, by proof of the discovery of a lode within the boundaries of the so-called claim, the staking and location of which was sought to be established. (p. 31, Record.)

This was clearly wrong and very much to the prejudice of plaintiff in error, in allowing the minds of the jury to be prejudiced by evidence of a state of affairs which may have had its origin in fraud. The first thing required by the laws is the discovery of a lode; the next

is the doing of certain work, and next the location and staking and recording. Yet evidence is admitted beginning with the staking and recording, which, in themselves, may have been unlawful by virtue of the want of the discovery of a lode within the territory so staked and located—with the result that what is in itself a fraud becomes evidence against the patented right of plaintiff in error. The plaintiff in error, though presumably innocent, is thus sought to be convicted of a constructive fraud against the government by the introduction in evidence of the fraud of another party.

U. S. vs. Iron S. M. Co., 24 Fed. Rep., 569.

Fourth assignment is to the admission of testimony as to the character of the ground patented as the Wells and Mover placer.

This court has, time and time again, decided that if there is one thing which is decisive between the patentee and a third person, and upon which, above everything else, the patent is conclusive, it is as to the character of the ground. In Steele vs. Smelting Co., 16 Otto, 447, Justice Field says, referring to the land department:

"That department, as we have frequently said, was established to supervise the various proceedings whereby a conveyance of title from the United States to portions of the public domain is obtained, and to see that the different requirements of different acts of Congress are complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land and whether it is of the *class* which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its anulment or limitation."

Again, further in said decision, Justice Field says:

"In French vs. Fyan, a patent had been issued to the State of Missouri, for swamp and overflowed land, under

the act of September 28, 1850. In an action of ejectment by a party claiming title under a grant to a railroad company, which would have carried the title if the land were not swamp and overflowed, parol testimony was offered to prove that it was not land of that character, and thus to impeach the validity of the patent. The Court below held that the patent concluded the question and rejected the testimony. The case being brought here the ruling was sustained."

The admission of evidence as to the character of the ground embraced within the Wells and Moyer placer necessarily developed into an investigation as to the value of the territory, for if, in the opinion of the witnesses, the ground is not placer, it follows *per se* that also in their opinion it has no value for placer purposes. Thus an impression was created upon the minds of the jury that because the ground was poor in alluvial gold contents, some ulterior and illegal motive must have existed in the minds of the locators to induce them to acquire title to ground as poor in gold as this was shown, or sought to be shown to be. That this sort of testimony is inadmissible see Correa vs. Frietas, 32 Cal., 339.

If the value of a mining claim for any purpose can be considered an element, evidence of which can, in a suit against a party not connected with the title, be allowed in any manner to affect or limit the title, or be introduced to show the intent of parties in acquiring that title, very few mining claims would be located. Ninety-nine out of a hundred claims are practically valueless at the date of location; and it is only after the prospector feels safe in his title, that he develops or proves up the value of the property. This development may take ten years, and during that time, is it to be supposed for a moment, that such evidence can in any way be held to affect the *bona fides* of his location?

Fifth assignment is to the admission of evidence as to the existence of a vein within the boundaries of the

Wells and Moyer placer, the proof of which existence was based upon workings and developments made within the placer since the date of the issuance of the patent for the same. (See p. 35, div. 62, Record).

It is easy now, years after the issuance of the patent and after workings and developments have been pushed into and within the boundaries of the placer, and have there disclosed a vein or lode, to establish that that lode disclosed in such workings exists within the placer. It is self-evident that if a vein now exists that it must have existed at the date of the issuance of the placer patent. But at that date, the workings and developments upon which the testimony objected to under this assignment is based, did not exist, and had not been made, dug or excavated, and were not made or dug until years afterwards. How, then, can what is disclosed in these workings be held to have been known at the date of the issuance of the patent? While the workings may or may not prove the vein disclosed by them to be the same and identical vein as that which was discovered on the Stone, Rock and Dome, a thousand feet from and without the boundaries of the placer, prior to the date of the issuance of the patent, whatever they do show could not have been known to exist before they were made. In spite of all the speculative theories that were formed with regard to the dip or direction of that vein, evidence as to what exists at this date within these recent workings cannot be received in order to prove that those who held those theories had knowledge of the existence of what is now shown in these workings at a long time prior to the date when they were excavated.

Sixth assignment is the refusal to allow plaintiff in error to prove that the vein which it was claimed by defendants was known to exist within the boundaries of the Wells and Moyer placer, was identical with the vein located by grantors of plaintiff in error, without the bound-

aries of the Wells and Moyer placer, and on the Stone, Rock and Dome lodes, long prior to the location and patenting of the placer, and that said vein was the property of plaintiff in error at the date of the commencement of this suit, by virtue of the ownership of said Stone, Rock and Dome locations, and the possession of the apex upon those locations. (See p. 40, div. 71, Record.)

The refusal to admit this evidence deprived plaintiff in error of the right to prove one of the sources of title under which it claimed. It also prevented it from proving that the very vein, which defendants in error were seeking to prove was known to exist within the placer boundaries, had been once appropriated by other parties without the boundaries, under another title, to wit: several apex lode locations; that all had been done that could be done by other parties to acquire title to this very lode, and that the parties who now own the placer were, likewise, the grantees of the parties who had located this vein, as lode claims, in good faith, prior to the date of the application for a patent. That the vein having once been located on its apex without the placer it could not, under any possible set of circumstances be again lawfully located on its dip *within* the placer boundaries, no matter what amount of speculation or theory might have been held by the locators of either placer or lodes, as to its dip or direction or entry into the placer.

Is the failure to commit this unlawful act to be taken advantage of and used as a means of depriving plaintiff in error of the benefit of either source of title?

Seventh assignment is the exclusion of evidence as to the existence of faults, breaks, or dikes without the placer, breaking this so-called continuous vein into different and separate veins, and thereby preventing the identification of the particular vein claimed by defendants in error as being known to exist at the date of the issuance of the patent for the Wells and Moyer placer.

In this case plaintiff in error found the attorneys for

defendants in error seeking to establish as a continuous vein, the same identical vein which they, in a case which has been decided by this honorable court, to wit: Iron Co. vs. Cheesman, 116 U. S. 529, sought to establish, was broken up by dikes, faults and movements of the earth into a number of distinct and discontinuous veins, and which state of affairs, the records show they succeeded in persuading a jury to believe existed. When, however, it becomes their policy, these faults, dikes and eruptions all disappear like magic, and this immense territory becomes underlaid by a continuous vein which they declare was known to exist at a number of points *without* the placer boundaries, prior to the issuance of the placer patent, and being one continuous and identical, must have been known to exist, according to their theory, *within* the placer boundaries, as one end of a string is evidence that there is another. Plaintiff in error was not allowed to show that faults and dikes really did exist, running easterly and westerly across the strike of this vein, between some of the discoveries made outside the placer, and the placer, dividing this so-called continuous vein on its strike into a number of parts, and that proof of discovery of a vein at a remote point could not be held conclusive, on account of these breaks and faults, as to the continuance of that vein into the placer; and, therefore, is no proof that the particular vein discovered was identical with that now shown to exist within the placer.

Eighth and ninth assignments are to the admission of evidence of conversations of Mr. Stevens relative to the existence of veins *without* the boundaries of the placer, or his expression of any ideas made prior to the date of the issuance of the patent.

In the first place, evidence as to Mr. Stevens' conversations as to lodes *without* the placer boundaries is certainly inadmissible, for the reasons above set forth, as proving

or tending to establish the existence of lodes *within* the placer. The burden of these conversations and of all of them was to the effect that Mr. Stevens had made a number of lode locations along what he believed to be the apex of a vein. That parties finding that this vein appeared to dip, at a slight angle to the eastward, could be reached easily from points on the surface, at slight expense, had made so-called locations on the dip of this vein. That Stevens bought some of these locations out, rather than contest them, and in the conversations at the date of these purchases he told them that he had located the apex of the vein, and that he believed that vein extended a great distance to the eastward. That wherever it went it was his, by virtue of his apex locations. (See record, pp. 42, 44, 65, 66.) Stevens having located his claims as the law provides, on the apex of this vein, his grantees can not be deprived of it where it, departing from the produced end lines of those lode locations and becoming legally another vein, dips into this placer, because he expressed an opinion that it dips in a certain direction. He, at that time, speaking before the location of the placer, formed his theory that it did so dip, and also formed ideas and other theories that the country was underlaid with mineral. He didn't *see* that one vein, as he expressed it, from Malta and Leadville to the Mosquito range. He said he formed his theories from what knowledge he had of the formation of the country. That he believed at that time that if a railroad could be induced to come into Leadville it would make a great mining camp. His theories and speculations have, unfortunately for his grantees, if such evidence can be received, proved correct.

The territory described by him has turned out to be underlaid by vast veins which have enriched the whole country. Because he had the ability to foretell this state

of affairs, shall his predictions be now allowed to recoil upon his grantees, and be introduced as evidence in order to deprive them of certain property. The testimony of one witness (see record, p. 61) shows that at a time before the acquisition of title by Stevens of the Wells and Moyer placer, he, Stevens, was desirous of acquiring that title for the purpose of keeping people from the surface of the ground, and making it impossible for them to sink and reach the vein on its dip, the vein to which he had already acquired title by virtue of his apex locations. It appears to counsel that had Mr. Stevens, at the date of the application for patent, actually worked his lodes from their apex to the placer boundary lines (which he had not done), and had received almost absolute demonstration that the vein extended within the placer boundaries, that it would have been perfectly lawful for him, as a means of protecting his lode on its dip, or for any other purpose whatsoever, to acquire title to the Wells and Moyer, as placer. It was confessedly mineral ground, and had not and has not, throughout its entire area, any vein or lode outcropping thereon, and had not, at that time, any developments showing, or tending to show the existence thereon of any vein or lode. It would not have been an unlawful act. There was no doubt about the land being subject to entry as placer, the officials of the land department having since decided that it *was* so subject to entry by the issuance of a patent therefor. And it was not then, nor would it be now, incumbent upon any one to ascertain, by extensive developments, to ascertain whether it contained gold in quantities to pay or not. It was sufficient, and would now be sufficient, that it was that class of mineral land subject to entry as placer, and that it was valuable to Mr. Stevens for a certain purpose.

Tenth assignment was the refusal to allow plaintiff in error to show that the ground in controversy is not within

the so-called Crown Point and Pinnacle lode claims, belonging to defendants in error, and refusing to allow plaintiff in error to show that the workings do not pass into the ground in controversy upon any lode or following any lode, the top or apex of which is within the limits of the Crown Point and Pinnacle claims.

Defendants in error had set up in their pleadings the right to work the vein which they allege was known to exist by virtue of a lode found on the Crown Point and Pinnacle claims. It was certainly essential for plaintiff in error, in order to present the case clearly to the jury, that it should show that this vein so claimed as being known to exist, was one to which defendants in error had no possible right or claim by virtue of possessing an apex or otherwise. That in working upon this vein within the Crown Point and Pinnacle claims defendants in error had really committed a trespass on the rights of the Rock and Dome and other claims holding the apex; and that the so-called discoveries upon the Crown Point and Pinnacle were made upon the dip of the very vein which has its outcrop on the Rock, Dome and Stone. That no right to follow that vein into the ground in controversy was given defendants in error by virtue of the possession of any apex within the Crown Point or Pinnacle claims. The inability to introduce this evidence may have left upon the minds of the jurors the belief that the vein was the property of defendants in error, by virtue of these Crown Point and Pinnacle locations, and that plaintiff in error was seeking to deprive them, by virtue of the placer location, of rights acquired under the Crown Point and Pinnacle claims.

Twelfth assignment is the refusal to charge as asked, that Thomas S. Wells and William Moyer were the applicants for the placer patent in question and their application to enter and patent the same was made on the 16th day of May, 1878. * * * They applied for

and obtained their patent claiming that no lode or vein within the boundaries of their claim was known to exist. The principal question in this case is whether or no the patentees, Wells and Moyer, had knowledge of the existence of such a lode or vein, and, if so, whether it is the same lode or vein from which plaintiff in this case, now the owner of the placer claim, seeks to dispossess the defendant.

The question in the case under the pleadings, was undoubtedly whether Wells and Moyer knew of the existence of the vein within the boundaries of the placer at the date of the entry for the placer patent—counsel believes that it should be at the date of the application for the patent, but the instruction was drawn to be wide enough. It required the vein thus known to be identified, and informed the jury that they must be satisfied that the vein so identified was the one particular vein upon which defendants in error were working. The evidence admitted was of such a wandering character it was impossible for counsel, throughout the trial, to compel the witnesses to particularize. According to their evidence this vein was one rolling ocean with waves in it of over a thousand feet in height. While shown, as claimed in the Coon Valley, at a depth of seven hundred feet, it reappears according to the evidence a mile to the eastward on the Pennsylvania at the surface. The existence of the so-called vein on the Pennsylvania, discovered *without* the placer, was admitted in evidence to prove that it was one and the same vein with that of the Coon Valley, Sequin, Rock, Dome and others on the other side of the placer and a distance of over a mile therefrom. In the absence of this instruction this kind of evidence led the jury to believe that under the law there was no necessity of identifying absolutely the vein which it was claimed was known to exist prior to the entry for patent for the placer, and that they could, therefore, draw their own conclusions

as to the identity of this vein, which, under such evidence, was, in spite of the peculiarities mentioned, asserted by witnesses to be one and the same vein.

Thirteenth assignment is the refusal to charge the jury that the lode or vein, which, if known to the applicants, Wells and Moyer, it became necessary for them to include in their application, ought to be excluded from the possession thereof must have been —

First—A lode or vein the top or apex of which outcropped at the surface, or was known to exist at some point below the surface within the boundaries of their placer claim.

Second—It must have been susceptible of location by its top or apex upon the surface of the ground of the placer claim.

Third—It must have been a lode or vein known to them at the time of their application for the placer patent, to wit, May 16th, 1878.

This instruction has three divisions, and it was vitally important to the case of plaintiff in error it should be given to the jury.

The first division provides that the lode or vein, falling within the reservation of the patent, must be a lode or vein, either which outcrops at the surface or was known to exist (as by developments) at some point beneath the surface, and that both these facts must exist *within* the boundaries of the placer. This is, certainly, not unreasonable. The words, "within the boundaries of the placer," are essentially part of section 2333, where that section describes the kind of lode which shall be excepted. No other construction would be fair, as counsel has endeavored previously to show.

The second division provides that the vein must be susceptible of location, and *that* also *within* the boundaries of the placer ground. No one will contend for a moment that congress had in mind in passing this section

any other kind of a vein than one which could be legally located. In section 2333 it provides that the center of the vein must be found. That twenty-five feet shall be measured from the center of the vein. And that, with an area of ground measured by the length of the strike of the vein within the placer, and fifty feet in width, shall be paid for at the rate of five dollars per acre.

How is the center of a vein, hundreds of feet beneath the surface, and undeveloped, even if known to exist through some occult power, to be ascertained, so that the point of that center can be fixed upon the surface; so that from that point twenty-five feet on either side can be measured? Would it be necessary, after performing such an act, supposing this vein to be nearly flat, to go immediately next to this fifty foot strip and repeat the operation, and thus until the whole placer is covered with these fifty foot strips? Then we should be sure that this lode underlying it had been located and we should have paid for the land both as lode and placer. The government would be paid for the land, perhaps, fifty times over, and after we had purchased it and paid for it, as above set forth, we should have the satisfaction, perhaps, of finding that somebody, without the placer, prior to the date of application for the patent for the placer, had located this same nearly flat lode upon the apex, and by virtue of that apex owned the whole lode wherever it passed to the center of the earth on its dip. That our locations were not good and utterly valueless, and that in spite of them and of our endeavor to obtain it, we had lost the lode in any event. Such a construction of the intention of Congress cannot for a moment be entertained.

The intention of Congress was, that if a placer applicant had, within the placer, a vein, and measured off twenty-five feet on either side of it, and applied for it, it

would grant him that vein, and he would not be subject to be deprived of it in any manner, let alone by outside lode locations. The imaginary case stated above is exactly that of the Wells and Moyer placer. This placer is now shown to be underlaid by a nearly flat lode, the top or apex of which was discovered *without* the boundaries of the placer. It was believed by some at the time that perhaps the lode dipped under the placer. Had Wells and Moyer so believed and located over imaginary vein centers, fifty-foot strips all over the placer, plaintiff in error, to-day, in spite of those locations, would have found itself deprived of the right to that vein under lode locations made upon its apex *without* the boundaries of the placer. A vein cannot be twice located. If located on the apex it is not open to location on the dip. The conclusion then is, that the one and only kind of a vein which Congress intended to specify by section 2333, is a vein which it can grant—which it has the power to grant; and over which it has control. It is not a vein which has been appropriated by locations on its apex without the placer. It is not a vein which Congress has already granted by allowing it to be located on its apex. Neither was it the intention of Congress to deprive the locator of the apex, *without* the placer, of the right to follow under the placer by permitting the placer claimant to locate fifty-foot strips, and thus claim the right to that vein *within* the placer. Congress does and can only mean by that section to describe a vein having an apex within the boundaries of the placer, and one susceptible of legal location.

The third division provides that it must have been a lode or vein within the placer known to the applicants at the time of the application for the placer patent, to wit, May 16, 1878. The discussion of this division is virtually the discussion of the whole question involved in the case,

to wit: the meaning of the words "known to exist." The full discussion of the meaning of these words has been undertaken by counsel abler than and senior to the writer, who will, therefore, venture but little on this branch of the subject.

The rules of evidence do not allow of the indroduction of hearsay testimony to prove the existence of a fact or a thing. In this case, the existence of a vein, *within* certain boundaries, must be shown to have been *known* at a certain date, in order that defendants in error may prevail. Mere knowledge of the existence of a vein is not here sufficient. There must be knowledge also as to boundaries of property.

Has Congress intended to open wide the rule to allow the introduction of theories, speculations, assertions, common rumor and the belief of a community to establish the existence of this vein, or these boundaries? Has the existence of the boundaries to be proved in any different manner or under different rules than the existence of the vein within the boundaries? Is a greater latitude to be allowed in proving the existence of a vein, than should be allowed in proving the existence of the boundaries? How would the existence of the boundaries be proved in the regular order? It would be by the evidence of a witness that he had seen, walked over and touched the boundary stones, or monuments on the ground, or that he had established, from actual survey, the boundary posts or stones, and that consequently he knew where these boundaries were, by having walked over them, seen them, and touched them. In other words, by a demonstration to his mind by one or more of his senses. Can there be any other way by which his evidence could establish his particular knowledge of these boundaries? And would any other kind of evidence be admissible? If then, therefore, such evidence as this is required to establish knowledge

of the existence of the boundaries, is not precisely the same kind of evidence required to prove the knowledge of the existence of the vein within the boundaries? After testifying, first, to the boundaries, and his knowledge of their whereabouts, the witness must state, first, that he knows a vein when he sees one; what his competency in that regard is, and how he knows it. He must then say whether or not such a vein exists *within* the boundaries already testified to, and how he knows it exists there. That he has seen this vein, and, perhaps, has also touched or felt the same, while looking at it, and has seen the record of its location. That he knows, in some competent way, that the vein which he saw was a vein carrying gold, silver, cinnabar, or some other valuable metal in rock in place. That it was in possession of the placer claimant, or of some other person, or that it was so plainly visible upon the ground that the placer claimant could not have avoided seeing it, if he were familiar with his own property, which the law presumes he must be. This much as to the evidence as to the existence of the vein.

There is one other thing which must also be shown, and that is, that the placer claimant was competent to, and did know, what a vein was when he saw it, and therefore had no excuse for not including this particular vein in his application for patent. Would it be pretended for a moment that a vein, such as is now described, would be exempted from the operation of the patent simply because it was a conspicuous object at the date of the application, and was known to exist by the placer applicant at that date? Suppose a ledge of rocks, standing out of the level of the adjacent country, some sixty or seventy feet, within territory patented as a placer, known to the placer applicant at the date of his application — known to the whole community — by virtue of being so prominent an object. Supposing, years after,

this ledge should be discovered to be a vein, and a very valuable one, containing some little known metal, as, for instance, iridium; can a stranger appropriate this vein, and under what law can it be done? It is true the ledge was known to exist at the date of the application for the placer patent, by the placer claimant, but he did not know that it was a vein; and not believing it to be a vein, he certainly should not be visited with the penalty of forfeiture for failing to lay off the twenty-five foot strip on either side of it, and applying for it in his patent. How much less, therefore, should the placer claimant be held to an accountability, and a knowledge formed and based on theories, speculations, rumors and reports, as to the existence of a vein within the placer, which neither he, nor any person alive, ever saw or touched.

It would not be admisible as testimony in proving the boundaries, for a witness to say that he is an engineer: that while he had never surveyed the boundaries or seen them, he had seen one, and standing by that one, from his knowledge of his profession he could tell *about* where the others were, and felt justified in saying that he knew the boundaries. Such testimony as this would not and could not constitute knowledge; neither could Mr. Stevens' assertions, made as a practical miner, or a geologist, standing at Malta or at Riverside, according to the Leonhardy testimony, and delivering his lectures—giving his ideas to individuals, that knowing the vein occurred at this point, or knowing it occurred at that point, and having that knowledge, he could, from the experience derived in his profession, tell wherever that vein went on its dip or strike, or that he believed it extended from where he was standing to Mosquito Range, on an east and west line, and that on a north and south line he believed it extended a distance of some twenty miles. Does such evidence as this prove knowledge? Would

such evidence be sufficient to deprive a blacksmith of his rights, who had, without any knowledge of geology or mining or veins, located a placer within that territory; and would it be receivable as evidence that the lode existed and was claimed or known to exist within the blacksmith's placer prior to the date of his application for patent therefore?

If the knowledge referred to in the statute be not a knowledge derivable through or demonstrable by some one or other of the senses, and that *within* certain boundaries, how far and where will it lead us? Imagine the case of two prospectors meeting in an unknown and undeveloped country. They agree to become partners. In a few days one of them finds a lode. They work together continuously for some months, and summer arrives. A says to B, "B, I am not used to this sort of mining. I am a placer miner. I tell you what I will do: I will give you my interest in this lode, and go out prospecting on my own account for placers. From what I have seen of this country I believe there are valuable deposits, which I can make pay. Of course I shall keep my interest in the cabin, but you are welcome to my interest in the lode." A starts out. At a distance from where he had been previously working, after some prospecting, he runs across an alluvial deposit containing, let us say, gold, in what he considers valuable quantities. He locates the mine as a placer. His northern boundary line is just two thousand feet from the discovery of B's lode and from their cabin, and some 1,250 feet from the southern boundary end line of B's claim. They both work diligently. B works to the southern end of his claim, following his vein on its strike. The vein increasing in richness during the time. He finally finds that it crosses his southern boundary on its strike and increases in value south of his original claim. He knows

that in order to secure the vein where it crosses that southern end line he must make another lode location, and proceeds at once to do so in a due southerly direction and as a continuation of his old claim. This location laps upon A's placer a distance of some two hundred feet. "A" objects to this, but "B" tells him it will be all right. "All I shall claim will be the vein in the placer, if it extends into it, and as I shall work it underground it will not interfere with you." A says, "But my patent gives me the right to all veins the tops or apices of which are within my placer boundaries." "But", says B, "your patent also excepts all veins known to exist at the date o the placer patent, and you know well that this vein, which I have proved up, and shown *now* to extend within the placer, existed long before you located the placer. You not only saw it, you felt it and you worked on it; you owned an interest in it. You crossed it and walked along part of its outcrop every morning in going to work from the cabin to your placer, therefore, this vein was known to exist, and I have the right to work it, and it is excepted from your patent. It was known to exist by you, as well as, (to again use the *simile*) 'one end of a string proves to you the existence of the other.'"

The intention of congress was, without doubt, to constitute every location of fifteen hundred feet along the length or strike of a vein, a separate vein, in the eye of the law. So that B's first location would be regarded as one vein, and his second location, although geologically upon the same vein, as entirely a separate and new vein for all legal purposes, and must be so treated in order to definitely settle A's rights and quiet his title.

The last illustration has been made on a vein which is supposed to have its line of strike in a north and south line. The vein being discovered and worked at the northern end, the whereabouts of the southern end being

unknown, and subsequently to the issuance of A's placer patent, being found to exist within his placer boundaries, but being there a blind vein and covered by wash and debris.

The question of the vein having its outcrop or apex without the placer, at a greater or less distance therefrom, and which was known to exist by the placer patentee having felt and seen the same, prior to his patent application, and which is subsequently discovered, after years of development, to dip into the placer, is settled by the location of the apex. If the end lines of the apex lode location, when extended according to law, take in a part of the lode shown to continue and dip into the placer, the owner of the apex location is entitled to all of that lode under the placer within his end lines produced. If, however, it is shown that the part of the lode under the placer does not fall within the end lines produced, then that portion lying without the end lines produced becomes, legally, another vein, and is granted by the patent to the placer owner, by authority of the last clause of section 2333, which provides: "A patent for a placer claim shall convey all valuable mineral and other deposits within the boundaries thereof," until some one can show a clear title to it by virtue of owning a new portion of the apex.

Thirtieth assignment is the refusal to instruct the jury that the definition of what constitutes a placer, given by the statutes of the United States is, "Claims usually called placers include all forms of deposits, except veins of quartz or other rock in place." The veins of quartz or other rock in place are veins known to exist at the date of application for patent for the placer.

As much of the above instruction as is included in quotation marks is quoted *verbatim* from section 2329 of the Revised Statutes. Plaintiff in error was certainly entitled to receive the statutory definition of what consti-

tutes a placer as an instruction, and no other definition of what constitutes a placer should be given, unless explanatory of the statutory definition. Any other definition and especially the one given by the court could only be extremely misleading to the jury and detrimental to the rights of plaintiff in error.

Thirty-second assignment is the refusal to charge the jury that under the evidence any speculative theory, formed at the date of the issuance of the patent for the Wells and Moyer placer, from the fact that at that time discoveries of a vein or veins had been made outside the placer boundaries, that such vein so discovered ran into the placer, was and could only be the merest surmise. Belief in such theories (no matter how correct they may be proved by subsequent development) is not, under the law, evidence of that knowledge of the existence of a vein required to bring such vein within the second exception of the patent.

This instruction speaks for itself. It is well known that belief and hope are a prospector's life. It is upon these and these alone he exists from day to day, in spite of disappointment. And it is upon these and these alone that the mineral lands of the United States are located. Without them, our mines, to-day, would be undeveloped. It is seldom they are founded upon reason, or upon any basis aside from the individual temperament of the prospector. He is sometimes right, more often wrong. Therefore his hopes, belief, faith and ideas, or theories, can never be accepted as evidence to prove the existence of things. He might also be unfortunate because he is right, as Stevens' grantees may prove to be if this kind of evidence is admissible.

Counsel will not argue each instruction refused because in the argued instructions he has attempted to cover those unargued. He begs leave, however, to still rely for error upon the unargued instructions as well as upon those argued.

To proceed to the discussion of the charge *given* to the jury:

A large part of the charge was made up of a geological definition of what constitutes a placer in the original and Spanish meaning of the word. There is and can be no objection to the correctness of this scientific geological definition, and to the quotations from Le Conte and other geologists in support of it, but the fact that it was given as the *legal* definition to this jury operated strongly against the interests of plaintiff in error. After the admission before the jury of evidence of the character of the ground, that it was not in the *opinion* of the witnesses a placer, or rather not gold placer, they are told by the court that a placer must contain gold, or some metal in a free state in alluvial deposit, before it can be a placer.

Further evidence presented before them, that in the *opinion* of witnesses, from *surface* examinations, this placer does not contain gold or any other free metal in the alluvial deposit of which it is composed, led them at once to the conclusion that the ground is not placer ground. It is notorius, and the very scientific works from which his honor quoted bear out the statement, that all metals in alluvial deposits, occur in greatest quantities nearest to the bed rock, which, in this case, was shown to be hundreds of feet beneath the surface, and yet, the opinion of witnesses formed from surface examinations is received to demonstrate the fact that the gold does not exist within the placer, even on bed rock, also to demonstrate that the vein does and did exist within the placer, although neither the vein nor the bed rock had ever been exposed or developed prior to the date of application for the patent. The evidence is equally valuable in the one case as in the other, and equally inadmissible in both.

The thirty-eighth assignment is the charging of the jury

as follows: "As to each form of deposit provision is made in the act of Congress for acquiring title from the government, but the quantity of land which may be taken in a placer location is much larger than that which may be acquired in a lode location, and the proceedings for acquiring title differ in some particulars, to which it will be necessary to refer in detail."

Is this instruction law? Is it fact? Had the instruction been given prior to May 10th, 1872, it would have been both law and fact. At that date section 2330 U. S. Rev. Stat. was the only section bearing upon the subject. That section reads as follows:

"Legal subdivisions of forty acres may be subdivided into ten-acre tracts, and two or more persons or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof, but no location of a placer claim made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; * * "

This section provides that "no location of a placer claim made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons", making it possible at that time for one person to include one hundred and sixty acres in one location.

On May 10th, 1872, Congress passed another law, now section 2331 U. S. Revised Statutes, in words as follows:

"Where placer claims are upon surveyed lands and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims after the twentieth of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant, * * * * * ".

This section limits the amount of ground that may be included by one individual in a location to twenty acres.

If there is a conflict between the sections the latter must govern, because it was passed in 1872 while the former was passed in 1870.

We have already seen that by section 2320 U. S. Rev. Stat. Congress has fixed the size of lode claims at 1500 x 600 feet = $20\frac{2}{3}$ acres. Section 2331 fixes the size of placer claims at 20 acres, actually two thirds of an acre *less* for placers than for lodes.

There is no limit to the number of locations which can be made or acquired to either lodes or placers by any person; and, therefore, the assertion, made in this instruction, that more ground may be taken in a placer location than may be taken in a lode location, is neither law nor fact and is entirely misleading, when given as bearing upon the intent, or showing the intent, or being an element from which the intent could be interpreted, of the location of this Wells and Moyer placer. Had it been possible it would have been as legal for the placer locators to make nineteen lode locations to acquire the 190 acres included in the placer, if there had been any veins or lodes upon which they could base the lode locations. Further, the original location certificates of the Wells and Moyer placer show that the ground now embraced by it was originally located by some twelve men, whose rights were acquired by purchase. The instruction referred to impliedly places the badge of fraud upon the location of the placer, by first intimating that the ground was located that way because more could be acquired, and, secondly, by not explaining that the same amount of ground could be taken up by any one individual by multiplying his lode locations, and, thirdly, by implication that the location of the placer was a one man

act, and not really the act of twelve men, whose aggregate rights are now consolidated in the placer.

The forty-second assignment is the charging the jury as follows: "Counsel for plaintiff contend that they must have ascertained by actual exploration within the limits of the placer that the lode existed there, or that there must have been an outcropping of the lode within the limits of the placer, which could be seen by all observers; but such a rule would be unreasonable and wholly defeat the intent of the statute."

This instruction is virtually an instruction to find for the defendants. Reading between the lines it stands, "though it may be true that there was not, at the date of the application for patent for the Wells and Moyer placer, any developed vein, or any vein, the top, apex or outcrop of which was visible within the placer boundaries, though it may be true that it was utterly impossible for the locators of the placer to make a valid lode location within the boundaries of the placer, even had the placer not been in existence; though it may be true that it was impossible to find within the placer the center of any vein from which they could measure twenty-five feet on either side, or the direction of the strike of which they could ascertain. Though it was impossible for placer locators, had they so desired, to have acquired the legal title to this or any lode which is now proved to exist within the placer, yet it is "unreasonable" for counsel to contend, that because it is impossible to do any or all of these things, that such impossibility should be taken or accepted as a valid defense against a stranger to the title, who may, by burrowing under ground from the outside of the placer, be in possession of a vein found therein, and which he may claim was known to exist outside the placer; this, in spite of the fact that the placer patent conveys the right to all mineral and other deposits within the boundaries of the placer; and although the

Judge giving the instruction has, himself stated, in the case of The Leadville Mining Company vs. Fitzgerald, 4 Morrison, 385, that: "Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it, as part of some lode or vein having its top or apex in other territory."

In this case we have an admitted deposit having its apex without the boundaries of the placer, properly and legally located by lode claims belonging to some person, but admittedly not the property of defendants in error. (See Record p. 70). It is, however, declared unreasonable and as wholly defeating the intent of the statute, for plaintiff in error to defend its title to that portion of the deposit within the boundaries of the placer location in controversy in this action in possession of a stranger to the placer title, who does not claim his right through an apex of the vein without the placer, by showing that no lode outcropped within the boundaries and that no developments showed any lode upon the placer at the date of issuance of patent, and by claiming that only such a lode was excepted under the patent.

The forty-third and forty-fourth assignments are the charging the jury as follows: "In this instance it seems to be unnecessary to declare what circumstances may be sufficient to affect a patentee with knowledge as declared by the statutes; for, if in any case it appear that an application for a patent is made with intent to acquire title to a lode or vein which *may* exist in the ground beneath the surface of a placer, it is believed that a patent issued upon such application cannot operate to convey such lode or vein."

"That intention could only be formed upon investigation as to the character of the ground and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute."

In these two instructions and in those following from

which counsel will quote, the court first comments on what it evidently considers to be the gist of the whole question in the case, to wit: The intention of the parties in locating this placer. The jury is accordingly instructed (assignment 44) that the belief on which this intention was founded was sufficient to amount to knowledge under the statute. If the intention can be shown at all it can only be shown and taken advantage of by the government as proof of fraud, in a direct proceeding to set aside the patent for that fraud. Evidence of fraud cannot be introduced to defeat the right of the grantees under the patent in favor of or by a third party having no title, and claiming none. And yet it would have been impossible for the jury not to have been convinced by these instructions that fraud, and radical fraud, existed. Facts brought forth by the trial were grouped in such a way; geological authorities searched, and quoted, and everything was so arranged that the conclusion was irresistible. Plaintiff in error was consequently found guilty and punished accordingly.

Counsel believes that the question of intent had and has not the remotest connection with this case. Certainly if it had or has and a fraud was committed, the plaintiff in error is, as far as the record shows, an innocent purchaser and cannot be affected by that fraud.

Counsel, however, believes the true doctrine to be *that in a matter where it is legal for a party to perform a certain act, it is immaterial, and no matter of inquiry as to what the intention of such party was in performing that act.*

In this case, suppose we admit a fraudulent intent to acquire known lodes. It has not been and cannot be accomplished, for does not the patent in express terms reserve known lodes? Knowing that all these patents contain these reservations, how foolish it would be to seek to obtain an indirect grant to a thing which will

be reserved in the evidence of that grant. How, then, can the fraud be perpetrated? If one cannot be perpetrated what relevancy can the intent then have upon the question? If there can be no fraud in the matter there can be no intent to commit one.

To pass to the examination of what inquiries, under the law, it is necessary for a man to make before locating a placer: The first question he must settle is, whether or not it is mineral land; second, does it contain any known lodes, that is, after diligent search and thorough examination of the surface, can I see any evidence of the outcropping, or are there developments which show the existence, of any lodes upon the ground, and do the county records show any locations as made thereon; and, third, is the land open to location, either as lode or placer. If the answer to the first question is in the affirmative, to the second in the negative, and to the third in the affirmative, he then may proceed with his location. It has been ascertained that it is mineral but not lode ground, and the only other way in which he may obtain title to it is as placer. It may be valuable only to him for some idea or theory he may possess, and the correctness or fallacy of which he may wish to demonstrate. This is not an inquiry which the government can make; if he sees there value for which he chooses to pay, it is his affair. He proceeds with his location, makes his application for patent, perfects his entry and receives his patent; which, when he receives it, becomes evidence and proof as against the whole world that his acts were legal; that the land is the character of land mentioned in the patent; and only the United States government itself can attack or limit that patent, and then only upon the ground of fraud. It being of course understood that the land department had authority to issue the same.

Suppose this man to have formed ideas that within

this area of mineral land there *may be* blind veins and other valuable deposits. He desires to obtain title to them. He has expressed his belief and his intention formed on that belief. He cannot make lode locations on the ground for he can discover no lodes. He therefore appropriates it as placer, intending after his title is perfected to develop the property. He simply does in this case what every business man does, risks his money on his opinion, first assuring himself of his title. The government is not defrauded and the community is benefitted by the expenditure of money which would not be spent were it impossible to secure the title.

Is such an intention evidence of fraud, and is it not allowable for a man to acquire title under such conditions? They are the same under which every mining location is made. The belief of the locator in every instance is that there is something worth having within the ground, and his intent is to get this something worth having. He gets it. If his lode location proves to be more valuable as a gold placer than as a lode, his patent gives him everything within his boundary lines, not already appropriated by others. If it is lawful for the locator of a lode, by his lode location, to acquire title to valuable gold placer subsequently found therein, and which he believed and had announced he believed, from the fact that his lode was a gold lode, *might* exist, is it not equally so for the placer locator to acquire title to a lode or deposit subsequently found, although he had announced his belief that the lode existed?

If the deduction is good from gold lode to gold placer it is equally so reversed. It was, therefore, clearly lawful, for Wells and Moyer, or for Stevens, to acquire title to this ground as placer, even if they did so for the purpose of owning all unknown deposits, within it, or for the purpose of preventing people sinking shafts from the

surface into a vein which Stevens announced that he believed dipped from his apex locations into and under the placer, in order to avoid litigation. Must this belief, now proved to be correct, and the announced intention accompanying it, while both of them lawful, at this late day, be construed into evidence of a fraud, and innocent grantees of the patentees be affected thereby?

The court, further, in the latter part of assignment forty-five charges the jury as follows: "Mr. Stevens and his associates were in search of lode locations—silver bearing lodes— and a metal which is not found in placer ground."

This portion of the charge is not supported by the evidence, because there is nothing in the evidence to show that Mr. Stevens was in search of lode locations on *this* ground; on the contrary, what the evidence does show is that Mr. Stevens had had an opportunity, and had been for years searching for veins upon which to make lode locations. That he and his associates had made a number, commencing at the north and proceeding south, the Iron, Iron Hat, Bull's Eye, Lime, Rock, Dome and Summit. What is the evidence in regard to the Summit? (See page 80, record.) That they sunk one or more shafts and finding no lode therein abandoned the location, because, for want of such discovery, Stevens did not believe it to be valid. Here on the face of the record is proof that Stevens did all he could possibly do to find lodes, and located all the lodes which he could find, and that thereafter, others taking advantage of his work, went behind him on the dip of his lodes. If to protect himself on the dip, he took up as placer, mineral land which contained no known lodes, in order to more fully protect his right to the vein or veins which he had already located, was he not justified? Yet it is said that Mr. Stevens was in search of lode locations, and that not only were those

lodes to be silver bearing lodes, but it was also said that silver is a metal which is not found in placers. As a matter of fact, as reference to Emmon's reports will show, silver has been found in California gulch in a free state, and more or less of it is always found associated with gold in all gold placers. The experience of all miners proves that the gold they extract from placers brings a lower or higher price per ounce, as it contains more or less silver. This instruction also could have had no other effect than to ~~influence~~ convince the jury of the fraud of the placer locators.

Finally, assignment forty-eight is a virtual instruction on the part of the court that though the ground in controversy in this action has been patented as a placer it is only a placer within certain limits, and that without these limits it is not a placer and contains nothing in the nature of a placer deposit, branding the obtaining of the patent as a fraud, and at once placing plaintiff in error in the most unenviable light possible, before the jury.

Counsel in conclusion begs to offer in extenuation of the length of this brief the fact that the case is of vast importance, not only to the parties interested, but to the whole mining community. The questions involved are new and authorities even from lower courts so few that it may almost be said they do not exist.

Most respectfully submitted,

FRANK W. OWERS,
Of Counsel for Plaintiff in Error.

124-374

124-374

In the Supreme Court

of the United States.

OCTOBER TERM, A. D. 1887.

THE IRON SILVER MINING COMPANY, Plaintiff in Error, vs. JOSEPH REYNOLDS AND JOHN D. MORRISSEY, Defendants in Error.	No. 960. Error to the Circuit Court of the United States, for the District of Colorado.

BRIEF AND ARGUMENT FOR THE DEFENDANTS IN ERROR.

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1. Before proceeding to a discussion of what is claimed by the plaintiff in error to be an assignment of errors, it may be well to inquire whether, in the condition of the record as presented to the consideration of this tribunal, there is anything to discuss. Assuming that the transcript of the record has been correctly prepared and printed by the clerk, and that the copy which we have for our guidance imports absolute verity, we are confronted at the threshhold of the case by the absence of even a pretended compliance by the plaintiff

in error, with the requirements of the rules of this Court and the statutes of the United States concerning writs of error. Section 997 of the Revised Statutes provides that: "There shall be annexed to and returned with any writ of error, for the removal of a cause at the day and place therein mentioned, an authenticated transcript of the record, *an assignment of errors and a prayer for reversal*, with a citation to the adverse party." Rule 21, Subdivision 4, of this Court, first announced May 1st, 1871, amended November 16th, 1872, and re-anounced January 7th, 1884, reads as follows: "When there is no assignment of errors *as required by section 997 of the Revised Statutes*, counsel will not be heard except at the request of the Court, and errors not specified according to this rule, will be disregarded; but the Court at its option may notice a plain error not assigned or specified." The record in this cause was filed during the recess between the last and the present term. By the statutory provision just cited, it would seem that an assignment of errors and a prayer for reversal is as essential a part of the proceedings to be followed by the plaintiff in error, as is the suing out of the writ to which it must be annexed. It is something, the disregard of which cannot be remedied; but when error is patent upon the face of the record, the Court may, by a rule of its own, request argument thereupon. An examination of the record in this case discloses the fact that although voluminous, *it contains neither assignment of error nor prayer for reversal*, and up to the date of our receipt of a copy of the argument of Mr. Owers, which was shortly after the first day of October, 1887, we have had no notification of the errors upon which counsel intended to ask for a reversal, unless, indeed, we might assume them to be based upon the vast number of exceptions disclosed by the record. This radical defect has either been overlooked or ignored by

counsel, or they have assumed that the specification of errors in the argument filed, would cure it. These specifications were made under paragraph 2, section 2, rule 21, of this Court. With all deference, however, we submit that the rule in question was not intended to, and does not provide a method for remedying such a defect in the transcript, since if it did it would be in opposition to the express requirements of section 997, R. S. Rule 21 requires that briefs of counsel shall in all cases contain a specification of the errors relied upon; but such specification can only be of errors already assigned as required by statute and not of something assigned for the first time in the brief; otherwise section 2, rule 21, would be out of harmony with section 4 of the same rule, which expressly declares that where there is no assignment as required by section 997, counsel will not be heard. This, *per se*, disposes of the assignment contained in the brief. We call this condition of things to the attention of the Court at this time and in this way, because it is the first opportunity which has presented itself to us to do so, and because it seems clear to us that under the decision of the Court upon the subject a formal motion to dismiss, based upon such grounds, is unnecessary. Where there has been no assignment of errors as required by the statute and the rule, this Court has dismissed a cause upon its own motion.

Portland Co. vs. U. S., 15 Wall., 1.

It has also affirmed the judgment of the Court below of its own motion.

Ryan vs. Koch, 17 Wall., 19.

It has also opened the record and granted an affirmance on the prayer of the defendant in error, there being no assignment, or proper assignment of error.

Maxwell vs. Stewart, 21 Wall., 71.

Treat vs. Jemison, 20 Wall., 652.

We object, therefore, to the consideration of any of the so-called assignments of error, and that the judgment of the Court below be affirmed by reason of the non-compliance by the plaintiff in error with the requirements of the law and of the rules of the Court. Even if the specification of errors in the appellant's brief could cure the defect of the absence of the assignment of errors, it cannot affect that other provision of the statute, equally important in our judgment, which requires that the assignment of errors shall be accompanied by prayer for reversal. There is not so much as a pretence of such a prayer, either in the transcript or in the assignments made in the brief, which, of course, is no part of the record. Since no errors have been specified according to the rule, we ask that all errors discussed by the plaintiff be disregarded; and as there is no plain error not assigned or specified, it seems to us that there is nothing before the Court, provided the rule referred to be enforced in this case according to its letter and spirit.

II.

The cause under consideration is one with which this Court is already familiar. It was tried on the 18th and 19th days of November, 1884, when a verdict for the present plaintiff in error, under the instruction of the Court, was returned. A judgment was rendered upon that verdict on the 29th day of December, 1884, whereupon it was brought on a writ of error by the present defendants to this Court, to which it was submitted under the 20th rule.

On the 1st day of March, 1886, this Court announced a decision which reversed the judgment of the Court below, deciding, among other things, that where a vein or lode is known to exist under the surface, included in a placer patent, at the time of application and entry, and is not in

the claimant's possession, and not mentioned in the application on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the patentee, who thereby acquires no interest in such vein or lode.

A mandate having issued from this Court to the Circuit Court for the district of Colorado, the cause was redocketed, after which, and on the 22d of January, 1887, another trial was had, resulting in a verdict for the defendants in error. Judgment having been rendered upon such a verdict, the case is once more here for determination, presenting the same questions, and differing from its previous condition in scarcely anything more than that the attitude of the parties has been changed.

It is true that the instructions given by the trial Court to the jury differed very materially from those submitted in the first trial, but that difference was the logical result of the decision of this Court, and consisted in the application to the case of the rules and principles which were here determined upon a full consideration of the respective rights of the parties. The evidence presented by the record does not essentially change any of its original features. It is more elaborate and extended than before, showing more fully, if possible, the knowledge and means of knowledge by the grantors of the plaintiff in error of the existence within the boundaries of the Wells and Moyer placer of the deposit of ore in place, thus embracing to some extent what may be termed the "local history" of California Gulch, from the early days of its occupancy down to the commencement of this controversy.

The questions presented by the record are not, therefore, "distinct from any then decided," but are in effect the same which have heretofore been reviewed by this Court.

At the risk of re-statement of some things with which the

members of this Court have become familiar from their consideration of this and similar causes, it is deemed expedient to sketch in brief outline the history of California Gulch, where this property is situated. In 1860, gold in loose condition, mingled with the debris overlying the solid formation of the mountains and constituting what are generally known as placer diggings, was discovered by prospectors along the shores of California Creek, and extending from its headwaters to its confluence with the Arkansas river. Claims were staked out and worked with varying success from that time until 1876, during all of which time the labor and energies of miners and mine-owners were directed to the separation of gold in its loose and variable quantities from the gravel containing it. The existence within the district of deposits of silver-bearing ore in place, while it may have been imagined by some, was up to that time known to but few, and to them only within a brief preceding period. About the year 1874, William H. Stevens, one of the grantors of the plaintiff in error, and its original President and one of its largest stockholders, having pursued a line of search and investigation based upon the discovery of carbonate ores in the Oro La Plata mine, had made a number of lode locations extending in a northerly and southerly direction, connecting with each other and crossing California Gulch immediately below and to the west of what is now known as the Wells and Moyer placer claim. These lode locations consisted of the Summit, Rock, Dome, Stone, Lime, Bull's-Eye and Iron lode claims, and were supposed by him to contain within their boundaries the top or apex of a lode or vein of silver and lead-bearing ore, lying between a floor of limestone and a roof or hanging wall of porphyry or eruptive rock. At about the close of the year 1876 the attention of prospectors in that section was diverted from a search for gold placer mines to a search for silver-bear-

ing lode deposits; in consequence of which, within the two or three years succeeding that period, almost the entire area of what was called California Mining District was located either as lode or placer claims, the latter locations having for the most part been made for the purpose of acquiring large tracts of ground supposed to comprise within their boundaries undefined areas of silver-bearing ore in rock in place at the point below the surface where the two rocks above mentioned would come in contact with each other. The developments of the years 1877 and 1878 established, with as much certainty as is possible, short of ocular demonstration, the existence within the limits of California Mining District of enormous bodies of silver and lead-bearing ores, lying in lenticular sheets or blankets, for the most part, at the point of contact between strata of limestone constituting one of the general geological features of the country, and an overlying mass of porphyritic or eruptive rock, forming the upper or more superficial deposit of rock in place beneath the debris of the mountain. These masses of ore were not always found at the line of contact between these two formations, as they frequently came together without any intervening space or material; but the occurrence of the bodies of ore were so general and uniformly distributed at this line, that to reach it became the law of the miner's action, and if he failed on sinking a shaft to find ore on the "contact," his next course would be to drift upon that line in one or more directions.

These sheets of ore, generally speaking, were horizontal. They dipped with gentle slope at an angle of ten to fifteen degrees below the horizon, and generally in an easterly direction. The greater part of the district has for its upper geological structure, first, a mass of debris, or gravel, or wash, as it is interchangeably called; second, a layer or overthrow of porphyritic rock, and third, and

below these, a bed of limestone. These last two formations have been faulted in many instances, but their relative position to each other, and their corresponding slope towards the east, remains for the most part unaltered.

In the early spring of the year 1878, there had been located to the west and northwest of what is now the Wells and Moyer placer claim, a large number of lode claims, upon the most of which, shafts had been sunk to the point of contact disclosing the existence of ore bodies or deposits in rock in place between the porphyry and limestone, and showing their dip or slope generally and gently toward the east and in the direction of the ground in controversy. The record discloses that the Oro La Plata mine, the first of these locations, was discovered in 1873 or 1874, and was the first discovery of carbonate ores in the district; and that between that time and the 23d of March, 1878, the Rock, the Dome, the Stone, the H. D., the William Redick, the Crown-Point, the Pinnacle, the Gnesen, the A. Y., and one or two other claims had been discovered and located, the developments upon which demonstrated the same state or condition of things. Prior to the 23d of March, 1878, William H. Stevens and Levi Z. Leiter, the immediate grantors of the plaintiff in error, attempted through one C. C. Baldwin, their surveyor, to locate all the ground lying east of the claims mentioned and now known as the Wells and Moyer placer, as a placer claim; but for some reason best known to themselves, they feared that such an attempt would not be successful. William Moyer, one of the patentees of the Wells and Moyer placer claim, was then the owner of the small strip or section of placer ground running on either side of California gulch from the William Redick mine eastward to Eureka gulch, and then for a short distance southerly along the said gulch. It had been worked for a number of years and was doubtless genuine placer

ground, as the term is understood in mining parlance. Mr. Baldwin says that finding they could not succeed, he was informed by Mr. Stevens that they intended to let Wells and Moyer locate the ground which lay to the south of the Rock and Dome, as a placer claim, who would, on acquiring title, convey to them; he, Stevens, having the idea that the lode on which his line of lode claims had been located, extended in an easterly direction on the dip, and that by taking up placer claims on the outside, he could keep parties from getting patents on them and from sinking further down on the dip. On or about the 23d day of March, 1878, in accordance with this intention, a survey was made by Henry D. Bates, ostensibly for Wells and Moyer, he then being in the employ of Stevens and Leiter, and which survey, conforming to the lines of the lode claims surrounding it, took in and comprised an area of ground embracing something over 193 acres in extent, including the placer claim of William Moyer, and running from thence up to the summit of and across the mountain lying between California and Iowa gulches. On the 11th day of April, 1878, or thereabouts, the survey seems to have been completed, and the "Wells and Moyer placer claim" assumed the dignity of a recorded location. The work was paid for by Stevens and Leiter. How many lode claims actually located and in process of development it included, none at this time can say. Its boundaries are identical almost throughout its area, with the boundaries of lode claims previously located, and some of which extend into the ground embraced in the location, like promontories into the sea.

A glance at one of the defendants' exhibits, which appears at page 70 of the transcript, not only confirms this statement, but gives the Court a very clear idea of the process adopted by Mr. Stevens for the purpose of mo-

nopolizing that entire section of the country. The heavy black lines upon the exhibit represent the exterior boundaries of the placer claim, and it will be seen that every little vacant piece of ground between the claims located to the west of Eureka gulch was included within the survey, while the Summit, the Leadville, the Nisi Prius and the Gnesen lode claims were not respected at all, but the lines of the placer survey swept them out of existence, and destroyed their autonomy as lode locations as completely as though they had been placed upon a blackboard and sponged off to be succeeded by something else. It is true that for the purpose of preventing adverses, and in order to carry out the ultimate design of acquiring a large area of territory for the deposits in place which it contains, Wells, Moyer and Mr. Stevens agreed with the owners of the Nisi Prius, the Gnesen, Pennsylvania and others, to make them conveyance of all ground claimed by them within the limits of the placer; but that does not affect the accuracy of our statement, but serves rather to confirm our contention as to what the object of this location was and the knowledge of the existence of the lode or deposit which plaintiff's grantors must have had, and are now estopped from denying, that they had at the time of the location and patenting of the Wells and Moyer placer. No good reason can be assigned for their agreements with the owners of conflicting lode claims, save the single and conclusive one, that adverses and trials growing out of them would conclusively establish the existence of the lode deposit within the placer, and thus defeat the darling object of the application.

It is plaintively asserted by counsel for the plaintiff in error, that the ground in controversy had all been originally located as placers in small parcels, which were included in one general location by Wells and Moyer, the subsequent purchasers of them. We challenge the inspec-

tion of the record as to the correctness of this proposition, and confidently assert that while it appears in the testimony of Mr. Wells that there had been in past years some locations of placer claims upon the ground, yet no such locations existed, or were transferred to either Wells or Moyer at any time; that Moyer was surprised when Bates proposed to extend the lines of the claim across the mountain, and that, with the exception of the claims owned by these gentlemen in the bed of California and Eureka gulches, and constituting, according to the estimate of the witnesses, about five per cent. of the entire placer claim as located, no original placer location was included in the survey. Mr. Henry D. Bates made the survey in March, 1878. At folio 110 of the transcript, he says he surveyed the whole of it at the request of Mr. Stevens, whose agent paid him for doing it. Mr. Stevens marked out on the map in lead-pencil the ground which he wanted taken in. He wanted the survey to leave out such claims as were *bona fide* and owned by other people. He thought the vein ran under the ground, and that if he had surface rights to it he could prevent litigation by keeping outsiders off it. Moyer helped to make the survey, and when the witness came to the point where he started up hill, Moyer seemed to have been surprised, and asked why he was going in that direction, to which the witness replied *that he was following Mr. Stevens' instructions.* Moyer did not so understand it,—he never supposed the ground in that direction could be called placer ground, but nevertheless followed Bates' lead. At folio 111 the latter says he first surveyed the tract into two claims under Mr. Borden's direction, the latter being Stevens' agent. This was done because the ground taken together would constitute more than one hundred and sixty acres; but after the survey was made the two locations were immediately consolidated into one, and the application for the patent followed.

In February, 1878, Mr. Stevens purchased the "H. D." lode claim from its owners. He wanted them at the time of the purchase to sign and swear to an agreemnet to the effect that they would make no additional lode locations above it. He then said that the mineral dipped from the Stone lode into the H. D. A glance at the exhibit shows the latter to be between the Stone and the placer claims. Stevens was also an owner in the Wm. Redick, which then showed the deposit dipping to the east.

Transcript, pp. 42, 43 and 45, Testimony of Dutro and Donath.

We have then, at the time of this survey, a condition of things the truth of which is beyond dispute and which makes the subsequent conduct of Wells, Moyer and Stevens consistent only with the proposition that the object to be subserved by the location and patenting of the Wells and Moyer placer, was the perversion of the statute concerning placer claims and the consequent acquisition of a large tract of ground valuable only for lode purposes. *The fact that a number of locations was upon the very ground included in the survey;* that agreements were made with such owners thereof as were disposed to resist the application for patent to convey to them such premises as they claimed to own as lode locations; that the boundaries of the claim, like a pattern, conformed absolutely to the artificial lines made by other lode locations; that the pretense of the ground being placer was based upon the possession by Wells and Moyer of a narrow fringe of territory within the lines of the placer; that Moyer himself was surprised at the extent, character and direction of the survey; that Stevens and Leiter were the owners of many of the lode claims bordering upon and in the immediate neighborhood of the property; that Wells and

Moyer were the ostensible, while Stevens and Leiter were the actual owners of the property; that the latter were holding two placer miners out to the world as desiring to extend their placer acquisitions, while they were really paying all the expenses of the project; that Stevens had time upon time declared that from the geological characteristics of the district the ground was underlaid with a deposit of mineral in rock in place of great value, and had just before then purchased the H. D. lode claim, which extended so far into the ground afterwards located as a placer as to almost bisect it; that developments in adjacent mines all went to confirm the correctness of this conclusion, and above all, that notwithstanding the country had been settled and extensive placer operations had been carried on for eighteen years previously thereto, no experiments of a placer mining character, upon the premises outside of the limits of the gulch itself, had been successful—all these things carry conviction to the mind of any reasonable man that at the time of the location of this claim it was the wrongful purpose of the grantors of the plaintiff in error to perpetrate a deliberate and unpardonable fraud upon the government, and to use the agencies given to its citizens for the acquisition of its mineral domain, in such a manner as to pervert their original object and intention and to deprive other citizens of the United States from the exercise of their rights to prospect upon the public domain for the deposits of mineral in rock in place. A more complete, convincing and connected chain of circumstances was never presented to the consideration of a judicial tribunal.

If the Court desires to examine the nature and extent of the formation of the mineral in rock in place in that section of the country, it has but to turn to the second exhibit of the defendants in error, at page 70 of the tran-

script. The photograph representing that exhibit is not so clear as the map introduced in evidence by the engineer in the Court below, but the upper line of the dark colored mass called porphyry is intended to represent the surface of the ground, while the dark line between it and the limestone is intended to represent the mineral deposit of carbonate of lead carrying silver. Below this is the limestone which constitutes, for the most part, the floor of the mineral, although it is frequently found impregnated with silver and other metals, making it commercially valuable. A number of shafts are shown upon the exhibit, which, being sunk from the surface through the porphyry, upon reaching the line of contact almost inevitably disclose the same condition of affairs. The deposit of ore stretches from the Crown Point and Pinnacle shafts into the placer claim, so that its identity is apparent.

The condition of things at the time of the location of the placer claim having been described, it may not be amiss, before proceeding with the argument, to refer briefly to such developments as have taken place according to the testimony of the witnesses between the time of such location and the issue of the Receiver's receipt and patent. The claim was entered on the 22d day of July, 1878, and the patent bears date the 11th day of March, 1879. During the interval which elapsed between the date of location and the date of the entry no placer mining was attempted upon the premises in controversy, and from the date of the entry down to the issuance of the patent, and down even to the present day, neither the plaintiff in error or its grantors have ever pretended to regard the ground in controversy as valuable for anything but lode purposes. During the year 1878 work progressed on the A. Y., H. D., William Redick, Rock, Dome, Crown Point, Pinnacle and Oro La Plata mines, all of

which were located long anterior to the placer, and the developments followed the deposit of ore in an easterly direction with the same persistency and regularity that a falling body obeys the law of gravitation. Some of the developments referred to were made by Stevens and Leiter, others by outsiders, but all had the same tendency, and all were carried on in the same direction. [See testimony of witness S. S. Robinson for plaintiff in error.] A glance at the photographs of the surface of the placer claim, as shown in the four last exhibits of the defendants, reveals the prosecution of work for mineral in rock in place carried on in some places upon a most extensive scale, but they disclose no attempt at any other class of development. Huge dumps of debris and innumerable shaft-houses dot the surface of the hill, some of the shafts which they represent having been sunk by the plaintiff in error, and many of them by lessees of sections of the ground in controversy. No sane man has ever suspected or pretended that the placer claim was good for any other purpose, and when in connection with the circumstances known to the plaintiff's grantors at the time of the location and patenting of the property, we believe that their subsequent acts and conduct were all devoted to carrying out the theory, the express belief—nay, the statement of positive knowledge and conviction on the part of William H. Stevens as to the nature and character of the ground. The conclusion, while absolute before, becomes irresistible now, that the patenting of the Wells and Moyer placer claim was intended to vest in the patentee a title to the immense area of what is generally known as lode ground, by means of an extensive placer claim extending in every direction, like the arms of Briareus, and excluding to the extent of its boundaries all further prospecting and research by others, upon what should properly be the mineral domain of the United States.

In detailing some of the facts disclosed by the transcript of the record in this case, we have not felt it necessary to follow the example of opposing counsel and set out the statements of some witness *in extenso*, or to refer, folio by folio, to the different matters which came to the attention of and was admitted in evidence by the Court below. The argument at best must be a long one, and it is necessary to abbreviate wherever it is possible, especially as we may safely assume that the transcript, as well as the arguments, will receive the Court's attention.

We believe that, notwithstanding the assignment in one of the briefs of counsel for plaintiff in error of over fifty alleged errors, that the questions presented for decision simply involve a consideration of sections 2320, 2322 and 2333 of the Revised Statutes of the United States, and some of the exceptions contained in patents issued by the Interior Department under these sections, to placer claims. That is to say, that the questions so presented are practically those upon which this Court has already expressed itself when the case was before it on a prior occasion for review, and that the appeal at present is in effect a motion for a re-hearing of the propositions then involved. Counsel for plaintiff in error practically desire the Court to reverse itself, not only upon the propositions heretofore passed on, but in the very case in which said decision was made.

We concede that the problems presented for solution are novel, but not to the extent that they were prior to the decision referred to. Up to that time they were as novel as important, because no direct decision concerning them could be found in the books. They are important, as claimed by counsel for plaintiff in error, not only because of the effect which their ultimate determination must have upon the conflicting rights of lode and placer claimants within the same or upon adjoining premises, and

which have been patented under act of Congress of May 10th, 1872, but also because men like the grantors of the plaintiff in error will hereafter be compelled to square their future conduct by a rule prescribed for them by this tribunal.

Notwithstanding our belief that this Court has already reached a conclusion upon the questions here involved, we deem it desirable to repeat some of the arguments then used, as well as to reply as best we can to some of the views set forth by our brethren on the other side. Except their method of discussion of the term "known," as used in the statute, they do not differ essentially from the argument which their predecessors filed at the former hearing. We think, then, that the propositions to be presented for consideration, with the exception of those which arise out of the instructions of the Court, can be confined to the following:

First.—What is the limit and extent of a grant of the government to a proprietor of a placer claim under section 2333 of the Revised Statutes, and what can the grantee under such a patent claim under the provisions of that section in connection with the first two exceptions inserted in the patent by the Interior Department?

Second.—What is the limit and extent of a grant of the government to a proprietor of a lode mining claim under section 2322 of the Revised Statutes, and the particular vein located and patented?

Third.—What is the proper construction of the following clause in the placer patent, to wit: "That it may be entered by the proprietor of any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits for the purpose of extracting or removing ore from such vein, lode or deposit, should the same or any part thereof be

found to penetrate, intersect, pass through or dip into the mining ground or premises hereby granted"?

Fourth.—Has the proprietor of a placer claim containing a lode or deposit known to exist at the time of his patent, any right to interfere with or oust a third person from the possession of such lode or deposit, whether the latter has any title thereto or otherwise?

I.

The first proposition for discussion, therefore, is whether a patent to a placer claim under the act of May 10, 1872, conveys all known deposits or veins in rock in place which have not been *discovered and located* as lode claims at the time of the application for a patent to such placer claim, or whether all such deposits or veins known or claimed to exist at the date of such patent are excepted from the grant thereof, whether, at the time of such application they were located as lode claims or not? This query involves a consideration of sections 2333 and 2320 of the Revised Statutes as to the first two exceptions which are found in all patents for placer claims issued by the government. For convenience we here quote the two sections of the statute referred to:

"Section 2333. Where the same person, association or corporation, is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim with the statement that it includes such vein or lode, and in such a case a patent shall issue for the placer claim subject to the provisions of this chapter including such vein or lode, upon the payment of $5.00 per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of $2.50 per acre, together with all

costs of proceedings; and where a vein or lode such as described in section 2320 is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

Section 2320. "Mining claims *upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits* heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the 10th day of May, 1872, whether located by one or more persons, may equal but shall not exceed one thousand five hundred feet in length along the vein or lode, but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the width of the vein at the surface except where adverse rights render such limitation necessary. The end lines of each claim shall be parallel to each other."

We have italicized a clause of section 2320 to call attention to that part of it to which we think reference is made in section 2333, that being the only part of it which describes a vein or lode. Our contention is that it was the purpose and object of Congress in providing for the issuing of patents to placer claims to limit such grant as

far as possible to placer deposits proper, only extending it beyond such limitation to such vein or lode deposits as can only be discovered by subsequent development. If, therefore, any vein, lode or deposit of mineral in rock in place, whatever its form or characteristics may be, is known or claimed to exist within the boundaries of a placer claim at the time of application for patent or the issuance thereof, then such lode, vein or deposit cannot, and never was intended to pass by such patent, but remains as much a part of the public domain, open to location, as a lode claim, subject only to the right of the placer patentee to the superficial or placer deposit, as though no such patent to the premises had ever issued. This, we think, has always been, and we trust will always be the construction given to the section under consideration, since any other would utterly destroy the intention of congress to limit the dimensions of lode claims to a narrow compass, while permitting comparatively large tracts of territory to be embraced within patents for placer locations.

At this point it is necessary to notice the assertion of counsel for plaintiff in error, that under an application for a lode claim it is possible to acquire a greater extent of territory than could be included within a placer claim. Even if this were so, the fallacy of counsel's argument would consist in the fact that under the statute concerning lode claims the Government realizes twice as much per acre for its lode ground as it does from patentees for placer ground.

Assuming, for the sake of the argument, that under the acts of Congress unaffected by State or Territorial legislation a lode claim can be made to embrace twenty and two-third acres, while a placer claim is confined to twenty acres as a minimum, yet two things must be considered in connection with the assumption. The first, is that by

section 2320 the width of a lode claim can be limited by State or Territorial, or other mining regulations, to a minimum of fifty feet in width, and it is a historic fact that the privilege so given is one which has been acted upon by all, or nearly all, the mining States and Territories of the Union. The Colorado statute limits the width of a lode claim to three hundred feet, save in the counties of Boulder, Gilpin, Clear Creek and Summit, where the limitation is narrowed to one hundred and fifty feet, so that in no instance in Colorado can a lode mining claim exceed ten and one-third acres.

The other consideration is, that no State or Territorial Legislature has any power to diminish the size of a placer claim below twenty acres to the individual; still, under the privilege given by the Federal Statute, such claims are nearly always located by one in the names of eight or more individuals, whereupon the seven immediately convey to him, who thereby secures, with very little circumlocution, a quarter section of land, amounting in the aggregate to nearly sixteen times the area of an ordinary lode claim, and this at $2.50 an acre, with but $500 worth of improvements, is vastly different from the same area at $5 an acre, with $500 worth of improvements on each claim; for it must not be forgotten by the Court, although it has escaped the notice of counsel, that before a patent can be obtained upon a lode claim, no matter what its dimensions are, no less than $500 of actual improvement must be made upon it, while no greater amount than $500 is required to obtain a patent upon one hundred and sixty, or even a greater number of acres of placer ground.

In this instance it will be noticed by the Court, although it is significant that no allusion to it is made by counsel for plaintiff in error, that the patent for the Wells and Moyer placer was issued to but two men, and embraces one hundred and ninety-three and forty-three one-hun-

dredths acres, being one hundred and fifty-three and forty-three one-hundredths acres more than could have been located by Wells and Moyer. The instruction of the Court, which forms the thirty-eighth specification of errors in the brief of counsel, is not only correct, therefore, but if we consider it solely in the light of the statutory provision under consideration, it becomes emphatically so from the utterances of this tribunal upon the subject.

In the case of Smelting Co. vs. Kent, 104 U. S., 636, it was held that a patent issued subsequent to the passage of the act of '70 may embrace a placer mining claim consisting of more than one hundred and sixty acres, and including as many contiguous locations as the patentee had secured prior to his application. The proceedings to obtain a patent therefor are the same as when the claim covers but one location. It was also decided that labor and improvements, within the meaning of the statute, were deemed to have been put on the mining claim, whether it consisted of one or more locations, when the labor was performed or the improvements made for its development, though, in fact, such labor and improvements may be on ground which originally constituted only one of the locations, or may be at a distance from the claim.

In the case of Steel vs. Smelting Co., 106 U. S., 449, the same question was raised and the case of the Smelting Co. vs. Kemp was cited with approval. Since then the practice which had before been quite extensive, of applying for and obtaining patents in the name of one individual to large tracts of so-called placer ground, has become almost universal, and upon the doing of $500 worth of labor upon a tract owned by one individual who has acquired the same by a so-called purchase, and embracing hundreds of acres, it may all be included in one application for a patent. The statute, therefore, concern-

ing the patenting of placer mining claims, is as was stated by the Court below, much larger than the amount which may be acquired in a lode location; and the proceedings for acquiring it differ in other particulars, to which the Court referred in detail.

If we take the Wells and Moyer placer claim as a basis for illustrating this point we find that Stevens and Leiter, upon doing $500 worth of labor upon it and paying the government $487.50, making a total expenditure of $987.50, acquired title to 193 acres of ground, which would have made about nineteen lode claims of over ten acres each. To have entered this land as lode ground would have required the original expenditure of $9,500 for improvements and the payment of $975 to the government, at the rate of $5.00 an acre, which would have made an aggregate of $10,475, thus making a gain to Messrs. Stevens and Leiter of $9,487.50, to say nothing of the expenses attendant upon the making of nineteen separate applications for patent as contrasted with the one application which embraced the claim. Further illustration is unnecessary to show not only that the proceedings required for obtaining patents for the two classes of property are different, but that the acquisition of immense tracts under the guise of placer ground for a nominal sum, and which ground really contains lodes or veins known to exist, is perfectly feasible.

The criticism which Judge Dixon makes in his argument upon the instructions of the Court below upon this subject has at least the merit of novelty. After claiming that more territory can be included within a lode than a placer location, he asserts that "there is no limit to the number of lode claims and locations which may be made at the same time by the same individual or locator, whilst the placer claimant can make but one claim and location at the same time!" This astounding and until

now unheard-of proposition is based upon the provisions of section 2331, that "no such location shall include more than twenty acres for each individual claimant," and is made in turn the basis of an argument which proves to his satisfaction that the advantages offered for the acquisition of territory by lode over placer locations is a thousand to one! This sounds like caricature.

It is not true that placer locators are limited to but one location at a time; but, on the contrary, the provisions of law as to the number of claims of either class which a man may locate are the same. There is no limit, save such as are imposed by the desires or the resources of the individual. One of Judge Dixon's associate counsel is to-day the owner of more than a thousand acres of "placer ground" in the vicinity of Leadville, the most of which was located at the same time, and case No. 503 on the present docket of this Court is a controversy between this plaintiff in error and the owners of a lode claim located and patented upon the "William Moyer" placer, a placer claim located by the same Moyer for the same Stevens, for the same purpose, at nearly the same time with his location of the one in controversy, adjoining this placer on the north, and monopolizing the other side of California Gulch from the side on which this one is overspread.

And counsel is equally in error when he states that "in the present case ten individuals were required in the first instance to make claims and locations afterwards consolidated of the placer." Mr. Stevens did not condescend to so much useless circumlocution. He did order two surveys, which were signed by four or five men of straw, but even those he threw aside, and made one survey in the names of Thomas S. Wells and Wm. Moyer (Transcript, folio 45–c).

A discussion of the theory now under consideration

makes it necessary to call the attention of the Court just here to the first two exceptions contained in the patent of the plaintiff in error, and which are found in all placer patents. They are important, as not only defining the extent of the grant actually made to the grantors of the plaintiff in error, but also as evidencing the uniform and undeviating construction given by the Interior Department to section 2333 from May 10, 1872, down to the present time. They are: *First*—"The grant hereby made is restricted in its exterior limits to the boundaries of said lot No. 281, as hereinbefore described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits *which may hereafter be discovered within said limits*, and which were not claimed or known to exist at the date hereof."

Second—"Should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits *be claimed or known to exist within the above described premises at the date hereof*, the same is expressly excepted and excluded from these presents."

It will be noted that the first of the above quoted clauses, while not excepting anything in terms from the grant, expressly restricts and confines the conveyance to unknown and unclaimed veins, lodes or deposits in place. In order to emphasize what is meant by the term "claimed or known veins," it declares that the restriction shall apply to veins "thereafter to be discovered." While this language is tautologous, it is unmistakable; and if any emphasis upon the terms used were necessary, it is supplied by the second condition, which provides so emphatically that claimed or known veins or lodes are expressly excepted and excluded from the grant.

These exceptions are of necessity based upon section

2333 of the Revised Statutes, and must rest for their integrity upon the terms of that section.

Notwithstanding, in our judgment, their validity has been established by the decision of this Court on the former appeal, yet, since the exceptions are themselves the subject of such vigorous attack, it may not be amiss to refer to some of the reasons which can be assigned, not only to their soundness, but to the necessity for their introduction, in terms at least, in all placer patents.

A careful analysis of section 2333 of the Revised Statutes shows that it was intended to cover and provide for three conditions or circumstances:

First—The duty devolving upon the owner of a placer claim in making application for patent, who knows, or has reason to know, that within its limits is a lode, vein or deposit of mineral in rock in place.

Second—The effect and consequence of a failure by him to apply for and patent such deposit as a lode claim, as therein provided; and

Third—The extent of the grant to the patentee in the placer patent as to unknown lodes or veins in rock in place.

The fact that special provision is made in this connection for the mode of patenting lodes within placer claims when both are owned by the same person; that certain consequences are made to result from a disregard of such provision, and that the extent of the placer patent, as regards unknown lodes or veins, is measured and limited, should, of themselves, afford a convincing argument that Congress never intended that individuals or associations of individuals should include within patents for placer claims any deposits other than those usually included within and expressed by the latter term. This conclusion receives strength from the fact that, after ample provision was made in the act of May 10th, 1872, for the discovery,

location and patenting of lodes, veins and deposits of rock in place, separate sections were deemed necessary to give to citizens of the United States the right to discover, locate and patent *other* mineral lands. Thus, it is provided by section 2329 that "*claims usually called placers, including all forms of deposit, except veins of quartz or other rock in place, shall be subject to entry and patent,*" etc. A clear and complete distinction having been thus drawn by the act between the two forms of deposit, how can it be said that it was ever intended that the owner of a placer claim, knowing or having reason to know that it contains a lode, vein or deposit of ore in place, can acquire title to the latter, not only in violation of, but through the terms of the law, commanding him to make separate application for them? In this case it is charged by the answer, and proven by the testimony, not only of the defendant, but of the plaintiff in error, that when its grantors located and made application for the patent in controversy, they *knew* that a deposit in rock in place existed within its boundaries, and their purpose in locating it was to possess themselves of that deposit, and that the work done upon the placer was for the purpose of enjoying the fruits of the lode deposit found within it. Yet no application was made for the placer claim with the statement that it included any vein or lode, nor was any payment made for any part of it at the rate of $5 an acre. Thus the mandate of the statute was ignored; yet it is claimed that the plaintiff in error is entitled to the lode in question, first, because no tangible evidence of its actual existence was patent to the physical senses, and therefore everything was matter of conjecture; and second, because it was not located *as a lode claim* by some third party at the time the patent was applied for. It is difficult to see how the last position can be insisted upon, since the same section of the statute emphatically declares that when such a vein

or lode is known to exist, application for such placer claim, which does not include an application for a patent for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim.

Does this mean what it says, or that the government intended only to protect the vested rights of outsiders without intending to reserve anything for itself? If the latter construction is the proper one, why was not such phraseology employed in the framing of the section as to make that meaning not only possible, but clear? In other words, was it intended that the rights of some citizen of the United States should attach to a vein, lode or deposit within a placer claim by an actual location before the clause last cited from the statute becomes operative, or did Congress intend to exclude all known veins from the grant of placer patents, as its terms provide? That the latter was its intention, is irrefutable when the modifying clause following that which relates to "a conclusive declaration," etc., is considered. It provides that "where the existence of a vein or lode in the placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof." If counsel can define the office of this proviso and reconcile their definition with any other hypothesis than that for which we have contended, then we confess ourselves at fault in the construction which we claim for it. The principal issues upon which defensive testimony was given, was the knowledge of the grantors of the defendants in error at the time of the location and patenting of the Wells and Moyer placer claim of the existence within its boundaries of the lode, vein or deposit in dispute, and that the grantors of the defendants in error had, prior thereto, located the Crown Point and Pinnacle lode claims upon said vein or deposit

adjoining the surface boundaries of what was afterwards located as a placer claim. The testimony of Page, Evans, Deutro, Leonhardy, Arnold, Hathaway, Bates and others, shows that with the exception of an acre or two of ground directly within California gulch, the Wells and Moyer claim was utterly worthless for placer purposes. While Moyer denies, Stevens, and Wells himself, practically admit that Wells and Moyer were mere figureheads in the application for and obtaining patent to the placer claim. Stevens and Leiter paid all expenses for the application, survey and entry. That they intended by the patent to acquire an extensive tract of territory underlaid by a rich deposit of carbonate ore, which at the time they knew to be there, does not admit of a doubt. The testimony of these and other witnesses shows that Stevens stated at different times that his object in securing the patent was to obtain the mineral deposit referred to, and that Wells and Moyer were used for the purpose because of the unpopularity of Stevens and Leiter and of the certainty of opposition which an application for patent in their names would inevitably engender.

It is shown by the exhibits and testimony of the defendants in error, especially by their title papers (folio 126), and is wholly uncontradicted, that the Crown Point and Pinnacle claims belonging to the defendants in error, were discovered and located long prior to the location or pretended discovery of the Wells and Moyer placer. It was not only claimed but known, not simply as a matter of general information in the district, but to the grantors of the Iron Silver Mining Company in particular, which is Stevens and Leiter by another name, at the time of the location and application for patent and the entry of the Wells and Moyer claim, that a vein or lode of quartz or other rock in place bearing silver and

lead, existed within the limits thereof. That being so it was by express terms excluded from the grant of that patent. It was equally well known, as appears from the testimony of Deutro, Baldwin, Leonhardy, Bates and others, that the deposit within said boundaries entered from a westerly direction, that is to say, from the Crown Point and Pinnacle lodes. Having denied in his replication that his grantors knew when they applied for a patent to the Wells and Moyer placer claim that there existed within its boundaries the lode or deposit which the defendants in error previously located, and that the veins, lodes or deposits in the Crown Point and Pinnacle lode claims entered into and underneath the Wells and Moyer placer claim in their course easterly and downward, and the testimony as to this issue having been entirely against it, the plaintiff in error cannot well evade the effect of the conclusive declaration resulting by the statute from the failure to state in such application the existence of such lode or deposit and paying for it as the section requires. It is estopped by the action of its grantors from claiming possession of such veins or deposits, and the fact that the surface boundaries of the Crown Point and Pinnacle are outside of the placer patent, is, we submit, wholly immaterial. Counsel for the plaintiff in error seem to have been conscious of this, and for that reason the instructions to the Court which they number 34, 35, 36, 37 and 38, defining placer claims, become the subject of vigorous attack. If the argument based upon the vicious nature of these instructions be sound, then it must follow that the deposit of carbonate ores within the bosom of the Wells and Moyer placer claim, although many feet below the surface of the porphyritic rock, is a placer deposit and cannot form the subject of a lode location.

Bitter complaint is made that the Court below per-

mitted the defendants to show that free gold in paying quantities did not exist in the alluvium or wash covering the surface of the premises in controversy. It is said to be wholly irrelevant. But we suspect that the complaint is founded not so much upon the irrevelancy of the testimony so offered as upon the impossibility of successfully refuting it. If the ground contains no placer deposit; if it has never been utilized or attempted to be utilized for that purpose, it follows that its location as a placer must have been a pretense, and if so what was it? Did Stevens secure it for nothing or was he carrying out some design of his own? His own and the subsequent conduct of his grantor, together with the worthlessness of the premises for the ostensible purpose of its acquisition, furnish the answer.

It is true that section 2322 of the Revised Statutes, uses the term "placer" to cover all forms of deposit except those in rock in place, but when the entire section is considered, the definitions of a placer claim given by the Court cover the entire ground. "Claims usually called placers, including all forms of deposit except veins of quartz or other rock in place," is the language used. Of course the deposits must be valuable mineral, unless in order to determine what the claims are, which are usually called placers, it is necessary not only to distinguish them from deposits in rock in place, but also to determine under what conditions the term is usually employed to define the character of the mining claim. It may be "unfortunate for the plaintiff in error," as its counsel complains, that Congress has used the word "placers" in connection with the second class of mineral claims, but it is perhaps more unfortunate for it, that its grantors did not comprehend the term and gauge their action by it. If they saw fit to enlarge its meaning so as to attempt to make it embrace deposits of ore in rock in place, they

should not blame the law-making power for the dilemma in which they find themselves. It is certain that the distinction between the two classes of deposit has never before been questioned, and the ability to discern the one from the other is one of the simplest lessons which the prospector learns. The dilemma resulting from this position, assumed by one counsel, is seen by the other, and with a boldness which is commendable, Judge Dixon seeks to extricate his clients from it by declaring that "it is obvious that Congress intended that all such deposits (*i. e.*, all deposits in place, occupying a substantially horizontal position in the earth's crust), if known to exist, and not located—with definiteness—as lodes or veins, might be acquired under the denomination of placer, and by virtue of a placer patent." He does not assert that they are placers as the term is defined by the Federal statute, nor does he deny that they are a form of deposits in rock in place, but because they are some distance below the surface, because they seldom "outcrop," because they are in fact more literally "rock in place" than the filling of fissure veins, therefore they can be acquired by the formula known as the placer locations. With all due respect for the distinguished counsel, whose learning and erudition we never expect to equal, this seems to us to be a *reductio ad absurdum*.

Free gold, tin, and platina are metals which preserve their integrity after being eroded from their original position in place, and consequently are found in the loose alluvium of the surface. In England, in the tin streaming cases (*Carlyon* v. *Lovering*, 1 H. & N., 184), can be found a description of placer mining for tin ores, exactly analogous to the California placers. The essential peculiarities of a placer mine, whether of gold, tin or platinum are, that the ore or metal is found not in place but mixed with the loose soil and can only be obtained with

practical results by washing in some form with the rocker or the sluice, or on a larger scale, by booming, and on a grand scale by hydraulic works.

In no art is the state of development, from primitive appliances up to the perfection of wholesale destructive mining, more clearly shown than in this series of processes, but all are alike in being different forms of washing and none of them can be applied to lode mining.

Lode mines, on the contrary, are worked by shafts and inclines, the ore being won by blasting, and when won, crushed and reduced in mills.

Concurrent with these distinctions, it is found that the lode is generally confined to a narrow space between barren rocks while the placer covers a more extended surface, being spread over the ground, although to some extent confined by topographical causes to the center of the gulch, ascending up the hillside more or less, according to circumstances.

One of the early writers on the subject of mines, mining claims and water rights in California, Mr. Gregory Yale, defines a placer to be a deposit of gold or silver found in particles in the earth or beds of streams, and we assert without hesitation that when "claims usually called placers" are spoken of, the placer claims so defined are meant. It may be true, as counsel insist, that the Department of the Interior has patented mineral lands as placers which have been asserted to contain diamonds, bog-iron, potash, borax, mica, fire clay, kaolin, marble, slate, ochre, umber, coal oil, and a number of other mineral deposits, but it is certain that the plaintiff in error has not obtained a placer patent to the Wells and Moyer claim upon the theory that it contains any of the minerals enumerated. It is equally true that as placer ground the vast bulk of the Wells and Moyer placer is as good for these forms of deposit as any others which

might be defined as placer. Counsel might with equal propriety have informed the Court that patents have frequently been obtained for premises certified to be placers, but which have been used and intended to be used for town sites, timber claims, hay ranches, and nearly all the other uses to which land can be devoted; and some of them were obtained in this very district by Stevens and Leiter; but this does not change the principle which underlies the section of the Revised Statutes under consideration.

The only mineral which it was ever pretended any part of the Wells and Moyer claim contained in placer form, is gold; and the only part of it which was ever worked as placer mines are worked, was for that metal. Whether, therefore, silver, tin and other metals have been found in placer form in other sections of the United States, makes no difference. The charge of the Court was based upon the facts of the case and upon the other universal fact, that fully ninety-nine one-hundredths of the placer mines in the world are those which contain all particles of gold mixed with debris.

It will be noted in this connection, that counsel insist, as they did at the time of the hearing of the first writ of error, that in order for the defendants in error to establish any right to the ground in controversy as against the plaintiff in error, it must appear not only that they are working upon a lode or vein of mineral, but also upon a claim located within the boundaries of the placer, upon such vein of mineral, anterior to the application for patent on the Wells and Moyer. To sustain this view, the decision of Judge McCrary in the case of the *Iron Silver Mining Co.* v. *Sullivan*, 16 Fed. Rep., 839, has been relied upon. We have now, as ever, the highest regard for the judicial utterances of the distinguished Judge who delivered that opinion, and have not the slightest

desire to in any wise detract from his judicial utterances; but since, in the opinion referred to, he expressed grave doubts as to its correctness, and since, in our view of the former decision of this Court in this case Judge McCrary has been directly overruled, we feel less hesitation about criticising it than would otherwise be the case. It is unquestionable that the opinions of that learned Judge are not only entitled to great weight, but justly command universal respect; for they generally are based upon sound logic and represent the result of deep reflection and cautious consideration. There can be no doubt, however, that in this case, by committing the error of confounding the distinction between *lodes or veins* as such, on the one hand, and *claims located on veins and lodes* on the other, as a premise to his argument, he of necessity reached a conclusion at variance with the intention of Congress, and of the plain meaning and language employed in the framing of the section. He gives his decision with expressed misgivings as to its correctness, admits the difficulty attending the solution of the problem, and ends by saying that "the question is somewhat doubtful, and while I shall sustain the demurrer to the answer, I think that before rendering final judgment in these cases, counsel had better take this case to the Supreme Court and let the matter be finally settled there."

We would not discuss the merits of this decision at greater length if we did not feel that from the position which our adversaries have taken they assume that its force has not been weakened or its conclusions overthrown. They certainly assume it to be the law, and while, as before stated, we are satisfied that it has not been recognized by this Court, yet a necessity, if not of its recognition, at least of its review, has been forced upon us by the argument of plaintiff in error.

Concisely stated, the decision is that since the word

"claim" is used several times in section 2333 in connection with the words "vein or lode," the three must be construed together; and since a vein or lode claim differs from a vein or lode in that it defines something located over or upon a vein or lode and embracing surface ground on either side of it, it follows that unless a lode claim be in existence, properly located and defined, within the limits of a placer claim, at the time of the application for patent therefor, then such patent will carry with it all veins or lodes within its boundaries, whether known to the applicant or not. Such is not the meaning of the statute.

We have already referred to the fact that such construction would necessarily destroy the effect of the statute so far as the interest of the Government in the exclusion is concerned, and that unless some third party, a stranger to the application for patent, had at the time thereof acquired a vested interest in the lode or vein known to exist, by making a location upon it, the reservation provided for by the statute would be inoperative. This would deny to the Government, notwithstanding the language of the section, the right to reserve for itself lodes or veins which it could reserve for any of its citizens. It would practically deprive Congress of the power to segregate the lode or vein from the operation of a placer patent, save for a condition of things which would result in depriving the Government in any event from the enjoyment or possession of the thing excepted; since, if the reservation in favor of the Government does not result from the language used in section 2333, it cannot arise from any phraseology which might be employed by the law-making power. That the reservation or exception was intended to operate not only in favor of vested rights in other individuals, but in favor of the Government generally, whenever a vein, lode or deposit within a placer

claim is known to exist at the time of entry, is apparent, we think, from five considerations:

First—Other sections of the act of May 10, 1872, make ample provision for the preservation of the rights of third persons as against applications for patent to which they are strangers. Section 2326 enacts how and when adverse applications to lode claims shall be filed, and how they shall be disposed of. Section 2329 provides that placers shall be entered and patented in manner similar to lode claims, subject only to such exceptions as the difference between the two classes of deposits necessarily imposes. Lest a preclusion of possession or enjoyment should result from a disregard of these provisions regarding the filing and prosecution of adverse claims to applications for placer patents, the Interior Department has required them to be and they have been filed and prosecuted in the same manner and to the same extent as in applications for lode patents. Lode claims located previous to the application would, we think, be *ipso facto* excepted from a placer patent without a necessity for adversing, but such has undoubtedly been the previous course of proceeding.

Second—The primary object of section 2333 is to provide a method for patenting a placer claim including a vein or lode, *when the latter is in the possession of and claimed by the same person, association or corporation.* Such being the case, *the same person*, etc., must state that the application includes a vein or lode, and then only is it regarded upon such a statement as a vein or lode claim for the purpose of distinguishing it from the placer, and for the purpose of a patent; the section does not refer to a claim until it recites what shall be included within the placer application. If the vein or lode were regarded as a claim in the sense of a discovery, and location made thereon under other sections of the statute it would, *by the*

same person as well as by an outsider, have to be separately located, discovered, recorded and segregated from the public domain *as such,* before it could be either included in or excluded from the patent.

Third—In Sullivan's case, 16 Fed. Rep., cited by counsel, Judge McCrary divided section 2333 into four paragraphs, and based his decision principally upon a discussion of the third, which we submit, when properly analyzed, demonstrates with almost mathematical precision that the reservation made by the government was intended to operate *to itself* and not to owners of lode claims previously located on the same premises by others. Judge McCrary's third paragraph is as follows: "And when a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim, *an application for a patent for such placer claim which does not include an application for the vein or lode claim,* shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim." We have italicized that part of the paragraph which we think the learned Judge did not take into account at all, yet which gives the key to the intention of Congress. If it was meant by this section to exclude from the grant of a placer patent only such lodes as had been previously discovered and located by a third person, *why the necessity of estopping the grantee of a placer patent from claiming possession or ownership of lodes or veins not included by himself within his own application?* It is evident that the lode claim belonging to a third person cannot and is not expected to be included in the application of the owner of the placer. That is something which was never contemplated by the framers of the section, whose object was to define the rights of the placer claimant and the government, solely, and to reserve lodes and veins not included as lode claims *in the same application* which are,

ex necessitate, in possession of and claimed by the same person, association or corporation. To illustrate this idea we will suppose the Crown Point mine to have been located by the defendants in error when Wells and Moyer made application for their patent, and covering a part of the same surface, and that there had been included within it an application for patent to the Crown Point; to obtain such patent in that application Wells and Moyer would have been compelled to claim the ownership and possession of it themselves, since an allegation of title in the defendants in error would have denied the former any right to patent thereof.

Fourth—The statute works an absolute estoppel upon the owner of the placer claim to all title to any vein or lode not included within his application. This results from the unmistakable language of the section, and it is immaterial whether the owners of the placer be the owners of the lode claim or vein, or not. The section does not say that the act of the applicant shall amount to a conclusive declaration that he has no right of possession *to any vein or lode claim located by some third person, but to any lode or vein* known to exist within the limits of the claim. So that it may be that the applicant is in possession of it, yet the declaration is equally conclusive. Such identity of possession of both lode and placer precludes the idea of a previous location of the lode or vein by an outsider; and the conclusive declaration implies that the title to the lode or vein being still in the Government, it is "free and open to exploration and purchase" thereafter by citizens and those who have declared their intention to become such, under section 2319 of the Revised Statutes. "Where the existence of the vein is known, but concealed in the application, it is a fraud upon the Government," and such a patent should be set aside without reference to the claims or rights of third persons.

Fifth—Reference is evidently made by section 2333 to section 2320, because the latter section is about the only one which gives a description, if not a definition, of lodes or veins, as distinguished from placers, which are made to embrace "all other forms of deposit." It practically declares that if a placer claim, including a deposit usually known as a placer, such as is described in section 2330, contains a lode or vein deposit, such as is described in section 2320, then application for patent shall be specifically made therefor.

These considerations receive confirmation from the construction given the statute by the Interior Department. The second exception of the patent excludes from its grant any vein or lode within the boundaries of the placer, known to exist *at the date of the patent*. This implies that if a vein or lode should be found within the limits of a placer claim, between the date of application and entry, it would not pass by the patent. Yet how could this result if the thing excepted must not only be a lode or vein, but one properly located at the time of the application?

Let us suppose a placer claim to be three thousand feet long, and to have a known vein running through it. A. locates a lode claim in the placer, and on the vein for fifteen hundred feet, but the rest of it is not located, although its existence is not denied. Is it not puerile to contend that the placer patentee is the owner of fifteen hundred feet of the vein by virtue of his patent, but has no right to the remainder because of such location upon it?

The foregoing reasons justify the assertion that by section 2333 it was intended that if the owner of a placer claim, in possession of the vein or lode within its boundaries, desires to obtain a title to such vein or lode in his application for a patent to his placer, and thus prevent any third person from making any claim to it, he can do so

by simply stating that his application includes such vein, whereupon, by paying at the rate of $5 an acre for a strip at the surface, his placer patent will include his vein; failing to do which, the vein is excepted from the patent, and subject to location by other citizens as fully as though the same laid outside of and beyond the limits of the placer premises.

"While the lode is not mentioned in the patent, the Court held that for the purposes of this suit, the title to it was conferred by that instrument.

"It appears to us that such a proposition is opposed to the policy of the acts of Congress in the different rules which it applies to granting titles to placer mines and to vein, lode and fissure mines; to the express language of the statute, and to the reservations in the patent itself.

"We are of opinion that Congress meant that veins and lodes known to exist when the patent was asked for, should be excluded from the grant as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land and his placer mine and such lodes or veins of mineral matter within it as were unknown; but as to such as *were known* to exist, he gets by that patent no right whatever."

Iron Silver Mining Co. vs. Reynolds, 116 U. S., 693–698.

This language is apparently comprehensive enough to settle the question for all time, and finds material for its support, not only in the matters hereinbefore suggested, but in others which are equally cogent. The reference in

section 2333 to section 2320 makes the latter section, so far as its language is germane to the object of the former, a part of it. Section 2320 contains a description of two things, to wit: Mining claims and veins or lodes. As the two essentially differ, and as we are expressly referred to one of them only, that one is the object of our search. The veins or lodes described in definite language in that section, are: "All quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper and other valuable deposits;" hence it is to this that reference was made. The balance of the section provides for the size, shape and character of lode claims to be located thereon. The Interior Department, in performing its duty of issuing patents under this law, have ever since followed this construction. Referring to the exceptions already quoted from the placer patents issued by it, it will be found that one of them restricts the grant to the surface and all veins or lodes (not vein or lode claims) of the above description, not known, etc., while the other expressly excludes from the grant all veins or lodes (not vein or lode claims) of the above description, known or claimed to exist at the date of the patent. This construction precludes the possibility of any intention by Congress to except from its placer patents only such lodes which have been duly located by outsiders at the date of the placer entry, since it makes the exception operate down to the very date of the patent.

If we suppose the terms "vein or lode claim," as used in section 2333, to mean a mining location upon a vein or lode in Colorado, it must, by our local statutes, consist of a piece of ground not to exceed fifteen hundred feet in length by three hundred feet in width. The section provides that when a vein or lode is in possession of some person making application for a patent to the placer claim which includes the vein, he shall make a statement to

that effect in his application, in which case the placer patent shall include such vein or lode, upon the payment of $5 per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. This means, under the construction contended for by counsel for plaintiff in error, that payment should be made at the rate of $5 per acre for the vein or lode claim, fifteen hundred feet in length by three hundred feet in width, together with an additional strip of twenty-five feet in width on each side, or three hundred and fifty feet in all, or else it means that if a lode claim is located within the limits of a placer claim by an outsider, he must, owing to an accident of the situation, content himself with a strip of ground fifty feet in width by fifteen hundred feet in length, instead of fifteen hundred feet in length by three hundred feet in width, which he would be entitled to if his claim were situated elsewhere; either of which is an absurdity.

To further illustrate the consequences resulting from the position of the plaintiff in error, if a reconsideration of the decision of this Court could be obtained, we will suppose that the owner of a placer claim comprising 160 acres or more, may be in possession of a vein or lode running the entire length of his claim, which he may desire to include in his application for a patent. His placer claim need conform to government subdivisions only when situate within the lines thereof; otherwise, it may, and frequently does, extend for thousands of feet along the line of a creek or gulch. The lode or vein in such a claim might be 1,500 feet or 15,000 feet in length; still, if it is included within the boundaries of the placer and claimed by the owner of the latter he may apply for a patent to the placer with the statement that it includes the vein or lode. There is nothing in the statutes which limits the owner of a placer patent to a 1,500 foot section of the vein included therein, but on the contrary, he may

pay for and receive a patent for such part thereof as it does include, regardless of the length of the strike of the vein contained within his placer. If the views of counsel for plaintiff in error be tenable, the patentee in such case could only obtain title to a strip 50 by 1,500 feet in area, while the conclusive declaration provided for by the statute might apply to the remainder of lodes comprised within the placer. The reservations contained in placer patents have been before the Courts for consideration but few times, yet in almost every such instance the decisions have been in favor of the views herein expressed and in full accord with the decision of this Court in the present case.

Clary vs. Hazlet, 7 Pac. Rep., 701; S. C., 67 Cal., 286.

Mantel vs. Noyes, Montana, 5 Pac. Rep. 855.

It is intimated, but not very vigorously asserted, that the language employed to express the reservation contained in placer patents relates to something, which, being dependent upon knowledge, can only apply to those instances where the fact of knowledge is conceded. And counsel indulge in a long dissertation upon the proposition that the degree or kind of knowledge required by the statute, differs from that proven in this case. We shall have something to say upon that subject shortly. So far as the phraseology of the reservations are concerned, however, they are exceptions and exclusions in the full sense of the term; they are something more than reservations, and as is stated by a standard author on real property, they stand as though the relations of the parties to the conveyance were reversed, the grantee becoming grantor.

3 Wash. Real Property, 3 Ed., 369, *et seq.*

It is of interest to note what the consequence of the consideration contended for by the plaintiff in error under the law in consideration, would be. Indeed, this is one test by which the proper construction of statute can be ascertained. If, therefore, we consider the act of May 10, 1872, as a whole, it is too clear for argument that Congress thereby intended to throw the entire mineral domain of the government open to exploration and purchase by its citizens and those who have declared their intention to become such; that a necessary distinction was drawn between lodes and placers; that while each is equally open to location, the title to one can be secured in a comparatively small quantity at $5 per acre, and to the other in a comparatively large quantity at $2.50 per acre; yet, if we are wrong in our premises, individuals, corporations and associations are at perfect liberty to acquire the fee to lodes or veins in practically unlimited quantity at fifty per cent. of what the government should receive therefor, were the intention and object of the statutes observed. It is true that these lands are not placed upon the market primarily for the purpose of enabling the Government to derive a revenue from their sale, nor was it primarily intended by the distinction in price to enable the Government to obtain a larger return for its lands in the one instance than in the other; but it is unquestionable that in making the distinction, the Government had a sound and salutary object and end in view. New and valuable mining districts are, through the energy and restlessness of the prospector, being constantly opened and discovered. Under counsel's construction, individuals may find upon the hitherto unprospected mineral domain lode deposits, 1,500 feet by 300 feet of which may contain sufficient metallic wealth to exhaust cupidity; yet in obedience to the dictates of natural selfishness and for the purpose of monopolizing

all that exists of the known deposit, vast tracts may be located and surveyed as placer claims; and the locators thereof, with full knowledge of its existence, and for the sole purpose of securing it, and conscious of the worthlessness of placer locations as such, can deliberately perpetrate a fraud upon the Government and a greater wrong upon its citizens, thus outraging the purposes of the statute under which all their proceedings are conducted. Then, in the teeth of the exceptions contained in such patent, the owner may say to the subsequent locator of part of the deposit: "It is true that we knew of the existence of the lode when the placer was located and patented; it is true that I have failed to accompany my application with a statement that it contained a lode; it is true that by reason of my failure to do so the statute says that I have conclusively declared that I have no right of possession thereto; it is true that by our expenditure of but $500 for improvements I have acquired a large area of country, but since you did not, at the time of my application, have a located and recorded lode claim within the limits of my placer, and since the government cannot reserve to itself anything which, without such reservation, would pass to me, you cannot have it now. It has cost me but $2.50 an acre, but nevertheless it is mine under the principle of statutory construction, and no power can take it from me."

Were such consequences ever intended? Senator Cole, of California, in the debate which accompanied the passage of the act of May 10, called the attention of the Senate to the necessity of preventing, by appropriate legislation, just such things as are liable to occur, if the views of the statute heretofore adopted by this Court, be erroneous. (See Cong. Globe, 42d Congress, p. 2459.) On June 19, 1866, Senator Stewart, of Nevada, in discussing the draft of the first mining law passed by Con-

gress, clearly outlines what the policy of the government should and was intended to be, in throwing the public mineral domain open to inspection. Such a policy as that which must result from any other than the decision of this and other Courts upon the subject can find no place in a plan which forms the groundwork of all our mining statutes, to wit: The laws and customs of the miners in the West.

In disposing of its public domain, whether agricultural or mineral, the government invariably requires that the claimant of any portion thereof shall give notice to the world by publication of his intention to make entry, so that all persons may have opportunity, if they so desire, to come in and contest the entry of the claimant. For this reason, among others, the owner of a placer claim containing a vein or lode is required to make a statement of the existence of the latter in his application for a patent to the former. Such publication calls the attention of outsiders to the extent of the claim, which otherwise would remain unnoticed; and failure to make it, unless amounting to a conclusive declaration against the person so failing, would enable him to obtain a patent to the lode or vein actually claimed by some outsider at the time of such application; while he, lulled into security by the seductive words of the statute, would be deprived of all right to contest by a disregard of the very things which were enacted for his benefit. If the owner of a placer can obtain title to the vein or lode known to exist within its limits without making such publication, *then it is a solitary exception to the general rule, and is the one instance in which some part of the public domain can be acquired from the government without advertisement*, and consequent opportunity to adverse claimants to come in and protect or attempt to protect their claims under the forms of law. It has been urged and will be urged that the ex-

ceptions inserted in a placer patent concerning known veins or lodes, might become as broad as the grant itself and thus be repugnant to the familiar rule that such exceptions or reservations are inconsistent with the grant and therefore void; but the very fact that such a possibility might result, indicates what the policy of the government is, since no such state of affairs can be produced by anything short of conduct such as that which characterized Wells and Moyer and Mr. Stevens in obtaining this patent. In any event, too, the exceptions result from the express provisions of the very law which prescribes the method of acquiring title to mineral lands. In such a case the government grant, when taken, must be received with all the modifications and restrictions which the granting power has seen fit to enact. It is not unfair to suppose that Congress deliberately intended to avoid all grants to the extent of exceptions contained therein, whenever patents were issued ostensibly for placers, but really for lodes, notwithstanding the result might be to absolutely vitiate the patent. Such a consequence ought to follow in every case, since it is by far the best means which the government can employ to protect itself against the frauds of individuals and keep its public domain open to exploration by its citizens until legally and fairly patented. It crops out all through the transcript that the plaintiff in error has thousands of acres of mineral domain in Lake County, the vast bulk of which it has acquired through placer patents obtained by the same grantors by means similar to those which were adopted in this instance; and yet, with all its effrontery, it will not pretend that it ever attempted to develop any of them save as lode or vein claims. Such an abuse of the privileges given by the government to its citizens should be punished more severely than by enforcing exceptions contained in the patents which they have obtained and

under which these wrongs are sought to be justified. But counsel declare that the word "claimed," that appears in the first and second reservations in the patent, is not authorized by the statute and consequently its use makes the reservation broader than the statute, thus interfering with the rights of the patentee to that extent and opening wide the door to litigation suggested either by the cupidity or dislike of outsiders; that while there is sufficient doubt as to the construction of the word "known," there is even no limit to conjecture if the use of the other word is to be justified. So far as that is concerned, we shall have very little to say.

It is true that the use of the word "claimed" in the reservation mentioned, seems to have the implied sanction of this Court in its decision in 116 U. S., and it is equally true that counsel for the defendants in error insisted that the word was proper when taken in connection with the language of the statute and the evils which it sought to avert, but when the question concerning the claims of other individuals as to the existence of a lode was asked to different witnesses, the Court below sustained the objection of the plaintiff in error thereto, and also charged the jury as appears at section 191 of the transcript, as follows: "The insertion of the word 'claim' in the second exception of the patent is unauthorized and you must consider the section as if it read 'known to exist,' only." This sets the Court at rest so far as it can affect this case, since in the trial Court the plaintiff in error obtained the construction for which it contended.

We confess that we cannot well understand the purpose of Judge Dixon's discussion of this word, either as it exists in the patent or as it was construed by Judge Hallett. Since he eliminated it from the controversy by giving the jury an instruction prepared by counsel for

the plaintiff in error, it cannot well become a factor in the decision to be made here.

Because the statute provides that where the owner of a placer claim is also the owner of a lode claim within its limits, he can obtain a patent for the latter by including it within his application for patent and paying therefor at the rate of $5.00 per acre for such vein with twenty-five feet on each side at the surface thereof, counsel for the plaintiff in error coolly assert that where a placer claim contains a deposit in rock in place either not coming to the surface at all or lying in a horizontal bed beneath the surface, and appearing at the surface elsewhere, the statute does not apply to such deposits, but it passes with the grant of the placer patent. It has been frequently announced, and the proposition has never been successfully denied, either before this Court or elsewhere, that at the time of the passage of the act of May 10, 1872, many of the conditions attendant upon the formation of ore bodies in this country were unknown; not in the sense that similar formations had not been found elsewhere, but in the sense that they were not considered as a part of the mineral wealth of the United States. Strata or beds of mineral ore in rock in place conforming to the structure of the country, lying between the different formations and occupying other than substantially a vertical position, not having been developed, no provision was made *in terms* for the manner of their location and patenting; but the tremendous impetus which the passage of the act of May 10, 1872, gave to the mining industry of the far West, led to the discovery of such formations in great numbers, and it is safe to say that 75 per cent of the present silver product of the United States comes from contact and stratified deposits instead of fissure veins. Can it be said that because the formation of the ore deposit underneath the Wells and

Moyer placer does not protrude from the surface of that placer, therefore the patent to the placer conveys such deposit to the patentee? If so, then the granting and the excepting clause of a placer patent must be determined not by the statute itself, but by the topographical and geological formation of the country embraced within its boundaries, and a man would be able to acquire title to a known flat deposit in Leadville by a placer patent while he would be denied the same right under a similar patent issued under the same statute to ground in some other part of the State of Colorado, where the deposits in place are more vertical in their formation. Thus, the formation of the vein and the angle of its descent into the earth would become the controlling feature in the problem of statutory construction. "It is a vein" says counsel, "the top, apex or out-crop of which occurs within the placer, that section 2333 has in contemplation. Otherwise, how can you know in which direction to locate a fifty foot strip and ascertain the width of it so that from such center twenty-five feet on either side can be measured?" This is a query that deserves some attention, not because of its difficulty, but because it arises directly from the language of the section. The statute concerning the location of lode claims also provides that such a claim may equal but not exceed 300 feet on "each side of the middle of the vein at the surface." It has been found necessary, owing to the character of the mineral veins and deposits, some of which are found practically flat and others of which are found with the top or "outcrop" many feet below the surface, to assume, for the purpose of enabling citizens to acquire patent, that where a shaft sunk on such formations encounters mineral, such point is the center of the vein and to measure the given number of feet on either side of such shaft. By this theory many locations have been made possible which

otherwise would have found no warrant in law; and innumerable are the patents which have been issued to such locations. The same theory is applicable, or should be, to the proviso under consideration in section 2333.

But if, for the sake of argument, such a thing is conceded to be undeniable, then the obvious conclusion is that since Congress never intended that a placer patent should cover lode claims unless such lode claims were specially mentioned therein, then such patent can never convey a vein or lode known to exist within its boundaries but not protruding at the surface on account of its character, formation and condition in the earth, and, consequently, land containing such a deposit, and valuable for no other mineral purposes than because of its containing such a deposit, never should be the subject of an application or entry as a placer claim; and if the plaintiff in error is the owner of such a claim, containing such a deposit known to exist to its grantors prior to or at the time of the patent, it cannot complain that its patent is worthless unless it be permitted to retain that which was never granted by it, unless the vein developes "so that its width can be ascertained by measurement," since you must take "twenty-five feet on either side of it at the surface." The sort of veins which Congress intended to except must be such "as extend by their edge, top or apex through the country rock or other surrounding formation, upwards to or through the surface, and downwards perpendicularly;" and "nothing is a vein or lode which does not come within this description." Therefore, "from the situation of the vein in controversy," it is no vein at all within the limits of the placer patent, although some part of it was located by Stevens, in the Rock, Dome, and William Reddick as lode claims, and another part of it was purchased by him as the H. D. lode claim.

And so counsel insist "not only that the vein in ques-

tion was not excepted or intended to be, but that the acquiring of title to it by the placer patent, and as placer, was the only mode of so doing, and that which Congress intended." To this extreme does such a maze of contradictions carry them. The very definition of a vein or lode is ignored, if not denied. It is no longer "any zone or belt of mineralized rock lying between boundaries clearly separating it from the neighboring rock, impressed with the same forms, coming from the same sources, and appearing to have been created by the same processes;" but it is something which can be touched at the surface, and must be perpendicular, or practically so, in its course downward.

If anything were needed to demonstrate that this is a fallacy, the third exception in the patent supplies the need. That gives the right to entry within or upon the placer to the proprietors of *any vein* which *penetrates, intersects,* passes through, or dips into it. In addition to this we have only to refer to the decision in 116 U. S., where the existence of veins or lodes, not coming to the surface, are recognized as being embraced within the limits of the exceptions.

The highest point, or outcrop, of this deposit does enter the placer, however, from the Crown Point into the Leadville, and beyond that into the Nisi Prius, and this was conveyed by metes and bounds by Wells and Moyer to its owners.

There are many romantic suppositions in the chief argument for plaintiff in error as to the effect to be anticipated from the location of a placer claim covering mineral deposits in rock in place which have been discovered at considerable distance from the location. They are not apposite to the case at bar, but some of them suggest the method by which areas of ground are obtained by private individuals in the hope that lodes discovered by others in

the vicinity may ultimately enter the ground so obtained. We think none of them impose upon the Court the solution of any very difficult problems, and it is sufficient to say in passing that the *bona fides* of the placer claimant is, or should be, under all circumstances, a true test of his right of ownership to the vein within his premises. That there are many ways of evading the mandate of a statute is known to all men of experience, whether lawyers or laymen; and while the evasion in this instance is not as ingenious as some of the supposititious evasions of counsel, still it is natural, and, from the facts disclosed by the record, indubitable. "But experience has shown that both these classes of mineral deposits might be found within the same survey of superficial area; and section 2333 makes specific provision for such a case. There is no difficulty in case of a patent for a lode or vein, for these necessarily must include both the surface by which it was measured and the vein beneath it. But in the case of a placer mine whose deposits were superficial, there might be under it a vein of far more value than the twenty acres of surface mineral. A man cognizant of the existence of such a vein, who could, if he established his right to it as a lode, secure only a limited part of it, if he could cover it with a placer claim, would thereby increase the quantity of this vein over what he could get by making it a lode claim in double the amount, and in some cases regulated by the State or local mining laws, he might quadruple it." (Reynolds vs. Iron Silver Mining Company, 116 U. S., 695.)

Here it becomes necessary to notice what counsel for plaintiff in error have said upon the subject of the character, kind and extent of knowledge which, under the statute, must be shown to exist before the reservations in the patent become operative. The Courts have been treated to profuse metaphysical disquisitions upon the

subject of "knowledge," of what it consists, how it is acquired, when it is complete and when partial—embracing, in fact, everything that can be found upon the subject from an essay of a Boston school-girl on psychology to the researches of Comte or Herbert Spencer. Upon reading the discourses we are bewildered by the result, and to some extent are obliged to agree with counsel that after all there is no such thing as actual knowledge. Nevertheless, we adhere to our former conviction that this term was used by Congress in the sense in which it is ordinarily understood by the masses of mankind, and that claimants under placer patents cannot shield themselves behind or justify their conduct by refined and elaborate reasonings concerning the nature and attributes of knowledge, direct or indirect. The legitimate deduction to be drawn from the theory of counsel is that unless there is a vein within the limits of the placer claim which one can see with his eyes, feel with his hands, make tests of by analysis and trace it on the surface with comparatively little difficulty, and determine its boundaries by the actual exercise of some of the senses, it cannot be said to be "known to exist" in the meaning of the statute. In other words, that nothing can be said to be known except by processes that appeal directly to the senses or some one of them. This is a limitation upon the knowledge of man which none can for a moment admit. A lode claim coursing across the country in plain view may pass for half a foot or a foot under the slide and debris of the mountains and then disappear; yet the common experience of mankind tells everyone whose attention is called to it of the fact of its existence. The analogies furnished by geological research and discovery in given localities are in some instances an unerring index to the miner in his search for mineral wealth. The investigations and explorations made by Stevens in this and other placers convinced him

not only of the existence, but of the indefinite extent of this bed of mineral. Can he or his counsel be permitted to say, "We discovered this deposit in the immediate vicinity; we traced its course and marked its progress to the east; we knew from the developments which we had made and the money which we had expended that nothing but some great convulsion of nature could have stopped it within reasonable limits; we saw our neighbors encroaching upon it at every point in the same vicinity, and their developments, added to ours, confirmed the conviction which we previously entertained; we did not sink a shaft upon the premises because we feared that this disclosure would result in the sinking of numerous others by outsiders; but, notwithstanding all this, since we could not see into the solid rock from the surface, since we could not place our hands upon the ore, since absolute and positive knowledge was not obtainable by any other means, we made an application for a placer patent, resting our claim to possession of the mineral subsequently found beneath the surface upon the construction which the words 'known to exist' would receive at the hands of the Federal Courts?" Counsel say that in a matter where it is legal for a party to perform a certain act it is immaterial and no matter of inquiry as to what the intention of such party was in performing the act. This is probably true, but the converse of the proposition is equally true, to wit: that where it is illegal for a party to perform a certain act in a certain manner, it becomes material and a matter of inquiry as to what the intention of such party was in such performance. Now, it is illegal to obtain a vein through the agency of an application for a placer patent without disclosing that fact; and inasmuch as a claim is now made to the vein, based upon such patent, the existence of the vein having been concealed, the intention and purpose of Mr. Stevens in securing this patent

becomes one of the dominant questions, the solution of which is essential to a determination of the rights which his grantees now assert.

That intention is so obvious, from the testimony in this case, that counsel have not the hardihood to question it. It is urged, however, that since a patent has issued for the surface of the Wells and Moyer placer, it must include a deposit like the one in possession of the defendants in error, because there is no method provided by statute for locating or in any manner enabling a citizen of the United States to obtain possession of it; that one cannot go upon the surface of a placer for that purpose, since such an entry would constitute a trespass, and, as no title can find its origin in a trespass, therefore there can be no acquisition of the property in controversy; hence, counsel say it was the intention of the Government to permit deposits like this to be acquired by placer patent, because otherwise a specific provision would have been made in the act of 1872 for locating deposits in place not coming to the surface.

We have before adverted to the fact that many of the phenomena presented by developments made within the last fifteen years upon the public mineral domain, were not before then known to exist within our boundaries. It was intended by the act of 1872 to fill a want then felt to be urgent, and to fill it in a manner commensurate with the apparent needs of the people.

In many instances peculiar conditions have caused the letter of the statute to be evaded, but its spirit has always been enforced. We cannot, therefore, deny that the object of the statute was ample, because the flight of time has brought to the surface facts and circumstances to which it must apply, but which were dormant or unthought of at the time of its enactment.

Independent of this reasoning, however, we think that

the principles of the common law furnish a complete refutation of the position of the plaintiff in error. It is a familiar rule that whatever is necessary as an incident to the enjoyment of the principal thing included within or excepted from a grant, passes with such grant or is reserved with such exception. If A., as the owner of forty acres, sells thirty-nine of them, reserving to himself the fortieth in the center of the tract, a right-of-way across the land sold, to and from the premises reserved, is necessarily implied. If the Government has actually made the exception, which we insist upon, then it certainly, by necessary implication, has also reserved every essential which is requisite to its enjoyment or future conveyance of the thing reserved; hence, it seems to us that the argument of counsel falls to the ground of its own weight.

The chief reliance of Judge Dixon, notwithstanding his criticism of, and contention for, other alleged errors, is upon the construction which he thinks should be placed upon the words "*known to exist*" as they occur in the statute. He, therefore, objects at the outset that the conversations of Mr. Stevens, concerning the question of knowledge, should have been excluded, because "they have no tendency to show" such knowledge. Can he be serious when he declares that what Mr. Stevens said to Dutro and Donath when he purchased the H. D. from them, that his explanation to Leonhardy, his conversations with Hathaway, Bates and Baldwin, his publicly declared utterances, and his private beliefs, cannot, when coupled with his conduct toward the premises in controversy, be relied upon as showing knowledge? Must we place him in direct contact with the vein or deposit inside the limits of the placer, and exhibit him *in flagrante delicto* before he can be said to have *known* anything about the facts which deprived him and his grantee of any right to its ownership? It would be equally consistent to maintain that

the principles governing the production of proof by the prosecution in criminal cases are applicable to the defendant in error, and unless we establish his knowledge beyond all reasonable doubt, he should be "acquitted." We do not hesitate to affirm that could such a rule be invoked against us, we could point to the records in the full faith that its contents would be equal to the requirement.

But these declarations are inadmissible because not within the issues formed by the pleadings. It is the knowledge of Wells and Moyer that is material, not that of Mr. Stevens. This assertion is significant. It suggests one of the reasons why the application for patent was not made directly by Stevens and Leiter. The former *knew*, as positively as one by necessary inference and deduction can know anything, that this deposit was underneath the premises. He could not, therefore, make the affidavit required by the rules of the Interior Department, that he knew of no veins or lodes within its limits. But perhaps Wells or Moyer could; besides which, if the question ever arose, he could shield himself just as his counsel are now attempting to do, by claiming that not he, but they, must be shown to have had the knowledge.

Will the learned counsel deliberately contend in this tribunal that a citizen of the United States desiring to possess himself of the title to a vein or lode, in an unlawful manner, and by reason of his knowledge is unable to do so in his own behalf, can make a bargain with another who shall act as his *alter ego* and institute and carry out proceedings in the name of that other, so that when the ordeal of his good faith comes upon him he can take refuge behind the instrument of his wrong? As well attempt to sustain the proposition that the actor is guilty while the accomplice is beyond the reach of justice. The knowledge of either or both is pertinent, and we have shown both. Nor is it at all material that

there is no allegation in the answer that Wells and Moyer made the entry for the benefit of Mr. Stevens. They did it, and Mr. Wells admits it like a man. The illustration made by counsel on page 19 of the second brief is not at all apposite. The case at bar is one in which a conspiracy is formed to defraud the government out of its property, ostensibly for the benefit of one but really for another. The beneficiary pays the government for the land, pays all the expenses incident to the entry and pays the applicant for his services, when the deed is passed. This extraordinary chain of events, commencing with the developments on the hill and ending with a patent to a piece of ground enhancing everything within the circumference of a boundary made by many lode locations, fastens knowledge so completely upon all concerned in the transactions, that no impartial man can escape the conclusion which we urge.

A recent magazine article, entitled "Arguments for the Unseen," would make a good companion piece to the sixth subdivision of Judge Dixon's argument. If his view of the definition of the term "known to exist" be correct, the door to the successful perpetration of fraud and to the disregarding statutory provisos with impunity is swung wide open. If the vein which was designed to be excepted from a placer patent must be one "cognizable by the senses of sight and touch," applications for lode patents will soon be abandoned, and placer locations will wholly supersede them. Two or three feet of debris will cover a multitude of sins, and surface wash will command a premium in the mining market.

And if the vein to be excepted must be so cognizable, whose sight and touch must be called into requisition? Must it be that of an experienced miner or that of a novice, whose physical senses when applied to the problem fails to enlighten him? And again, if the experienced

miner sees and touches the vein, can he secure the patent through the ignorant novice, and then assert that because the latter could not have *known*, therefore there is no exception?

In one thing we are in full accord with the learned gentleman. We agree that the word was used in the statute in its ordinary sense, and no strained or limited definition is permissible. That needs the citation of no authority. Yet, strange to say, counsel insists that the word should be shorn of its real significance. He would force it upon a Procrustean bed of his own making, and thus accomplish the very object against which he is pleased to cite authority.

What, then, is the "popular or received import" of the term knowledge? Webster defines it to be "certain apprehension, experience, information, cognition, notice," etc. This differs materially from the Dixonian defition, which deprives mankind of the greater part of that little information which it is supposed to possess. But that definition, it seems, is essential to "the stability of titles." Without it all would depend upon "the fickle and uncertain verdicts of juries," and "respectable members of the legal profession" cannot advise as to the meaning of the exceptions contained in placer patents. If absolutely sound advice, not only sound but warranted to insure against litigation, makes this construction necessary in the particular instance, it is a talismanic method of construction, the need of which is sadly felt in other branches of jurisprudence. This would seem, however, to be one designed more completely for the benefit of lawyers than for the welfare of the government and its citizens. To the inquiry as to the extent of the granting clauses of a patent a counselor might ask, "Was this vein one which you could see or feel when your patent was obtained?" If answered in the negative he would then

respond that nothing was excepted, and that would end the consultation. Very simple, truly, but not so simple as to have deceived our distinguished friend when he adorned the supreme bench of Wisconsin. All knowledge, according to Mill, is inferential, and this must be so as to everything deductive.

It is conceded (p. 16 Judge Dixon's argument) that a discoverer who works and develops a vein "up to the line of the placer or within a few feet of it might not pause in his work and make entry of the placer claim as in ignorance of the lode existing within it." This concession not only takes away the foundation of the "knowledge" argument, but seems to us to yield the question in the case. This deposit had been worked up to or within a few feet of the line in half a dozen claims, half of which were located by Stevens, and, with one exception, the others had been acquired by him. The H. D. is as much placer ground as is the ground on either side of it which is embraced in the placer patent, and the plaintiff in error might as well claim no knowledge of any vein or lode within the one as within the other.

The learned counsel is equally unfortunate in his claim that the patent should be treated as an agreement between individuals, with "the difference that if there is to be any more liberal rule adopted in the one case than in the other, it should be in favor of the purchaser from the Government." This is, in effect, saying that if there be any doubt as to the construction to be given to any clause of the grant, that doubt should be construed against the Government. We confess to some surprise at the statement of this proposition.

"In all questions of construction arising under grants, between the government and the citizen, a different rule prevails, in one respect, from that adopted in questions between individuals. Between the latter the construc-

tion, if doubtful, is always to be in favor of the grantee and against the grantor, whereas, in the case of the government, the construction is always against the grantee and in favor of the government. The act, in the latter case, is done by an agent and nothing will be presumed beyond the letter of the grant. Thus, where the government granted an estate upon conditions, which was broken, it was held at once to divest the title of the grantee without any entry or claim on the part of the grantors, as would have been necessary to defeat the estate, if it had been a private grant."

3 Washburn Real Property, pp. 171–2.
Kennedy vs. McCartney, 4 Port., 141.
Mayor vs. R. R. Co., 26 Pa. St., 355.
R. R. Co. vs. Litchfield, 23 How., 88.

But counsel insist that the deposit in question is not a known vein within the meaning of the statute, because, from its situation, "the utter impossibility of its having been applied for and included in the patent for the placer, is apparent." We have already adverted to this and attempted to maintain that this is no reason, if true, why it should have been patented *as a placer*, but it is not true. A casual examination of the records of the Mineral Division of the Land Department will show that hundreds of lode patents have been issued for locations in just such deposits, and among them will be found patents for the H. D. and Wm. Redick claims, issued to Wm. H. Stevens and Levi Z. Leiter, upon land which is an actual part of the ground in dispute, so far as its physical characteristics are concerned. These applications for patent will doubtless show, too, that these men in person or by agent made affidavit that these claims were located upon valid discovery of the veins or lodes therein contained. This, we think, effectually disposes of the premise upon which pages 27 and 28 of Judge Dixon's argument are based.

A further objection is that the plaintiff in error is a purchaser for value, and, consequently, is presumably an owner in good faith. Passing by the fact that the company is Mr. Stevens by another name, it is sufficient to say that the "conclusive declaration" provided for by the statute, would be of little avail if a subsequent grantee could set up his *bona fides* against its operation. If the vein was known to exist it did not pass by the fact, and the patentee certainly could not convey to another a greater estate in the premises than that acquired by himself. Hence, a purchaser for value is no better off than any other successor to the estate. He stands in the place of his grantor and cannot complain of any one but him if he has not acquired what he had reason to expect. The remedy of the Iron Silver Mining Company, if its title has failed, is against Stevens and Leiter on the covenants, not against the government or the defendants.

Counsel certainly misapprehends the position of the Court below, as well as the character of our defense, when he asserts that whatever frauds may have been practiced in the acquiring of the Wells and Moyer patent, it is, nevertheless, good in law, and if the objections which we urge to the plaintiffs' suit are tenable at all they are good only in a Court of equity and in a proceeding instituted to set aside the patent. We have not assailed the patent, nor do we deny its validity. On the contrary, we are insisting upon the enforcement of its exceptions, and claim that we are within them. Because locations have been made over the surface of the placer or claims of its invalidity are asserted by outsiders, counsel seem to think the integrity of the patent to the placer is assailed in this action. It would be strange, indeed, if the grantor of land, with an express exception, inserted in his conveyance, should be accused of endeavoring to

destroy his own grant whenever he should seek to enjoy the use of or convey the thing excepted, or should be told to seek a Court of equity to set aside his conveyance if he should resist the effort of his grantee to treat his conveyance as absolute.

It is hardly necessary to notice in more than a casual way the criticism made by Judge Dixon on those parts of the instruction to the jury which he has numbered 5, 6 and 8. It is significant that he omits any reference to No. 7, which must be read, however, to fully understand the others. We submit that a patent to grounds which is not placer cannot be obtained under section 2333, in order solely to acquire title to lodes which might be found thereon, for it is only unknown lodes in *placer ground* that pass under the grant so obtained. We do not concede that the instructions complained of conveyed the idea contended for; on the contrary, they expressly refer to such intention, information and belief as would *amount to knowledge under the statute.* No. 8 did not lay down "a distinct and independent proposition" at all. It is a sentence culled from the main body of the charge on account of its phraseology and used as though it were a complete instruction of itself. It is preceeded and followed by a reference to the circumstances attending the location of the placer to the conduct of Stevens, Leiter, Wells and Moyer, hence it must be considered as a whole.

That part of the instruction numbered 9 by counsel, and of which complaint is made, is in effect a statement of one of the points decided on the last appeal of the cause. It is followed by a statement that if the vein were known to exist it is excluded from the grant as completely as though the vein were described in clear terms, and by a quotation from the decision of this Court upon that subject. Hence the error would have been the

refusal or failure to give and not the giving of the charge excepted to.

III.

Apparently overlooking one of the propositions expressly decided by this Court at the former hearing, counsel accuse us of invading their client's possession without right, title or any justification either in law or in equity, and they say that as we have neither title nor claim of title to any of the ground above the point in dispute, and have the apex of no vein outside the same, therefore it becomes immaterial whether their possession be justified or not, since, as against those who have no title, they should at least be permitted to pose as the custodians of Government property, subject only to its complaint, but to the interference of no one else. A glance at the complaint is sufficient to show that the action is ejectment, and the plaintiff declares that it is the owner in fee of the premises from which it has been ousted. It has failed to prove such ownership and seizin in fee; having sued in ejectment and not in trespass, possession cannot be alleged as sufficient even as against an intruder. It must recover upon the strength of its own title, and cannot avail itself of the failure of the defendant to show any.

Sedgwick & Wait, Trial of Title to Land, 438.
Cobb vs. Lavelle, 89 Ills., 331.
Watts vs. Lindsey, 7 Wheat., 158.
Abbott, Trial Evidence, 691.
Tyler, Ejectment, 72.
Reynolds vs. Iron Silver Mg. Co. 116 U. S., 698.

The action was brought under section 249 of the Colorado Code of Civil Procedure, which requires that "the plaintiff in his complaint shall set forth the nature and extent of his estate in the property, and state whether it be in fee for life, for the life of another, or for a term of

years; and specifying such life or the duration of such term; or, if such plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district or of the United States, the State of Colorado, or otherwise, the complaint shall contain a brief statement of such possessory claim, and whether the right claimed is by pre-emption or purchase or by right of actual prior possession on the public domain of the United States." The plaintiff cannot recover a life estate, an estate tail or by possession under a count claiming an estate in fee simple, especially in those States which have a statutory provision similar to the one above quoted.

Almond vs. Bonnell, 76 Ills., 536.
Breed vs. Osborn, 113 Mass., 318.
Rawson vs. Taylor, 57 Me., 343.
Forsyth vs. Rowell, 59 Me., 131.

Had the plaintiff alleged possession and not an estate in fee as the basis of its claim to the premises in question, the rule might have been different; but it did not even so much as add a count to the complaint claiming such possession. It cannot assert one estate in its pleadings and establish its right to the premises by proving another.

Winstanley vs. Meacham, 58 Ills., 97.
Rupert vs. Mark, 15 Ills., 540.
Ballance vs. Rankin, 12 Ills., 420.

If in ejectment the plaintiff must recover upon the strength of his own and not upon the weakness of his adversary's title, then it would be a contradiction to assert that when defendant proves that plaintiff has no title the latter can nevertheless recover on possession alone if the defendant proves no title in himself. Were the action

trespass, the plaintiff's possession would be everything. If the patent to the Wells and Moyer placer claim does not convey to the patentee the lode or deposit in place existing underneath it, then any possession of such lode or deposit by a mere intruder having no right or title to it can result in damage to no one but the owner of the lode; and since the plaintiff does not own it under its placer patent, no judgment obtained by it against such intruder could operate to discharge the latter from responsibility to the Government for his trespass. The issues made by the pleadings preclude the possibility of right or title in the plaintiff by possession merely. The answer admits the issue of the patent, but relies upon its exceptions. That reliance is combatted by the plaintiff in its replication. If, therefore, we have sustained the burden cast upon us by proving the existence of the lode or deposit within the placer, the knowledge or means of knowledge thereof by the patentees and their grantees at the time of their application, entry and patent, its consequent exception from the granting clauses of the latter necessarily follows; hence, the plaintiff cannot recover upon pretense of possession merely, which would be but constructive, in any event.

This conclusion, however, is stoutly combatted by Judge Dixon, who says his possession is good as against a mere trespasser. So said the Circuit Court at the first trial, but it was reversed. But counsel cannot distinguish the case "from one where land has been sold reserving the standing trees to the grantor." If a stranger enters he says it would be no answer to the action of the owner of the land that he did not own the trees. Such an action, however, would be *trespass*, and not ejectment. We are not sued here for damage done, for injury to soil and rock adjacent to the deposit, but for an ouster of the

owner of the fee. Hence, the cases cited from 11 Wend. and 15 Mass. have no bearing upon the controversy.

If in the case from Massachusetts (which was trespass) the extra land included within the survey had been by statute open to exploration and purchase, or subject to entry by the proprietor of any vein, etc., the facts would have been more analogous to the question we are considering. Of the other cases cited by counsel that of Hutchinson vs. Perley alone holds in terms that a plaintiff in ejectment who alleges a title in fee can recover on proof of possession merely, and that case was brought under a statute essentially differing from our own, while there can be no question that it is opposed to the current of authority upon the subject.

As showing that the defendants are mere trespassers, Judge Dixon cites sections 2318 and 2319, R. S. The first does reserve all mineral lands from sale save as expressly provided by law. But the second is equally broad in declaring that *all* mineral lands of the United States are open to exploration and purchase; and since there is no limitation placed upon the language used, there is nothing reserved. Counsel must not forget that "the popular or received import of words furnishes the general rule for the interpretation of public laws," and a vein excepted by the government from its patent is as much a part of the public domain as though no patent had issued.

But since the patent confers everything save the vein or lode, no removal of any of the contents of the latter can be made which imperils the rocky case or bedding which encloses it, since this would be an appropriation of something besides the vein, and therefore a trespass. Nay, "the open space which the trespasser leaves behind him" is owned by the placer patentee, and he has his action for damages for the mere creation thereof. With

all respect to the learning and erudition of the distinguished counsel, we assert that this is puerile. It does not rise to the dignity of an argument. It would, if true, utterly destroy the express terms of the statute, and make the exceptions created by it wholly meaningless. Nothing ever was or ever can be granted or reserved from a grant without carrying or retaining whatever as an incident is essential to the possession or enjoyment of the thing granted or reserved. The plaintiff in error should cite the judgment of Portia, for it can find no other to support this remarkable position. We concede that in the removal of the ores from the vein or lode excepted the defendants in error cannot make inroads into the adjacent rocks, or needlessly blast them away or remove them. But that they may remove so much thereof as may be absolutely essential to the wresting of the contents of the vein or lode from its adamantine walls there is no question. So far as it can affect this appeal, we say, however, that the plaintiff in error has not shown, nor does it appear anywhere in the record, that a single ton of the barren or "country" rock has been taken from the Wells and Moyer placer by the defendants.

During the trial of the cause this dilemma seems to have been presented to counsel, who sought to introduce as a part of its case certain patents which had been issued by the Government to the Rock and Dome lode mining claims, lying entirely outside of the placer, and the title to which had been acquired by the plaintiff prior to the commencement of the suit. It was asserted that within the boundaries of the Rock and Dome lodes was the apex of the vein, lode or deposit which had been taken possession of by the defendants. Counsel say that the refusal to admit this evidence deprived plaintiff in error of the right to prove one of the sources of title under which it claimed. This is not so, since the only source of title al-

leged in the complaint is the Wells and Moyer patent, and no pretense is made of any title to the premises in controversy arising from any other source, until the plaintiff filed its replication, and there, contrary to all rules of pleadings, it asserted a title wholly different from and hostile to that which framed the basis of its action. The only object which could have been subserved by its introduction was to claim a right of constructive possession, growing out of the claim of title to the apex, and nothing in the pleadings justified it. Counsel go rather too far in discussing this matter when they say that the refusal of the Court to permit the introduction of this title prevented the plaintiff from proving that the very vein claimed by us had been once appropriated by their patents, without the placer boundaries, under another title; since that amounts to a confession of the knowledge of the existence of the vein in controversy, anterior to the Wells and Moyer location; while, instead of having been appropriated by their patents, it had, in fact, been appropriated by the very men who stood as sponsors to the Wells and Moyer location. If, having once been located on its apex, the vein could not, by any possibility, have again been lawfully located on its dip within the placer boundaries, then it would have been far better for the plaintiff, when it instituted this suit, to have based its claim upon the Rock and Dome patents rather than upon its placer title.

Counsel asks: "What objection exists to the plaintiff in ejectment having two titles or two sources of title, proving both?" There is none, so far as we know, provided both are pleaded. The plaintiff in error pleaded its placer title only. It did not deign to assert title to the lode or ledge in dispute until its amended complaint was filed. There is a very serious objection in those Courts, which regard the system of pleading as a science, to permitting

a plaintiff to set up one title in its complaint, and then meet the answer of its adversary by setting up a wholly different one in its replication.

Another objection to the introduction of the excluded patents is the unanswerable one, that they did not form another source of title, for the plaintiff in error cannot claim the point in controversy under the Wells and Moyer patent, if it holds it under the Rock and Dome patents. By the first it claims as unknown vein; by the second it claims as a part of a known vein previously patented under a different section of the mining law. Hence, the introduction of the lode patents would have totally destroyed the case presented by the original complaint. The case cited from 2 Abbott's Court of Appeals Reports is wholly foreign to the one at bar, and the fact that Judge Dixon had to resort to a line of obscure decisions, made up of cases rejected by the regular and official reporter of that Court, before he could find an authority which even seemed to sustain his so-called "point," is a strong argument in favor of its unsoundness.

IV.

It is necessary that we briefly discuss another branch of the controversy hardly less important, in our opinion, than the one which has formed the principal basis of the argument. The defendants in error asserted a right to the mineral deposit in controversy upon their title to and possession of the Crown Point and Pinnacle lode mining claims immediately adjoining the Wells and Moyer placer upon its western boundaries. They contended that their grantors, having located said claims upon the said deposit, and the said deposit having constituted the vein they had discovered, and which, therefore, formed the basis of their patents, they had the right under the provisions of the statute, and the exceptions contained in the patent, to

follow the said lode or deposit, although it might proceed beyond the vertical side boundaries of the claim. It is admitted, for the purposes of this case, that no other title inures to the defendants in error to the particular point in controversy, save such as they have acquired by the patents just mentioned, and upon the extent of the grant of the particular vein discovered depends their right, *as against the Government*, to that part of the deposit found within the Wells and Moyer placer claim.

It was stated at the last trial that the defendants made no claim to the ownership of the lode or deposit outside of the lines of the Crown Point and Pinnacle claims, by reason of its ownership of the apex thereof. It was not intended by that statement, as counsel seem to think, to renounce all or any title to the lode or vein, but to assert that no apex thereof was in the claims owned by the defendants in error. Our position is that, as *proprietors* of the lode or vein at the time of the location and patenting of the placer, the defendants in error have the right, under the third exception in the latter, to enter underneath it and extract the ores therefrom, since the lode penetrates the placer in its eastern or downward course in the mountain.

It is not true that the only evidence in the record, as to the discovery of the Pinnacle or Crown Point lodes, is that of Halloch, who places it in December, 1879. The location certificates of the two claims, as well as the recitals in the patents, show that they were discovered and located in 1877. Halloch was in the Pinnacle shaft in December, 1878. Bates knew of the Pinnacle in the spring of 1878, (fol. 109); Baldwin knew the Crown Point and Pinnacle since the summer of 1877 (fol. 103), and so did Barnard (fol. 98); Leonhardy knew them by hearsay "six or eight years ago," which would be about 1878 (fol. 93); Chandler knew, and worked on the Pinnacle in

June, 1877, when he thought they had a vein of carbonate ore (fol. 88); Govis knew of them in 1877 (fol. 87); so did Devlin (fol. 78), and Dutro first heard of them in the spring of 1878 (fol. 74); W. H .Stevens himself admits that he knew of them in 1877 (fol. 157). So that we are safe in assuming their location and discovery long anterior to the location of the Wells and Moyer.

Patents to lode claims are to be construed and their operation enlarged or limited principally by the provisions of section 2322 of the Revised Statutes. It reads as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made on any mineral vein, lode or ledge situated on the public domain, their heirs or assigns, where no adverse claim exists on the tenth day of May, 1872, so long as they comply with the laws of the United States and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout the entire depth, the top or apex of which lies inside of such surface lines extend downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges, shall be confined to such portions thereof as lie between vertical planes drawn downwards as above described through the end lines of their locations, so continued in their own direction that such claims will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the

vertical lines of this claim, to enter upon the surface of the claim owned or possessed by another."

We have before adverted to the fact that at the date of the passage of this act the existence of horizontal or blanket veins or deposits, while not unknown to geologists, were practically unknown to American miners, as their existence within the limits of the public domain was hardly then suspected. The statute sought to adapt itself to the necessities, conditions and peculiar features of an American industry, based upon the rules and regulations of those who followed it; an industry which had been tolerated by the indulgence but not warranted by the express assent of the governing power. These regulations had been found by experience to be essential to the protection as well as to the ascertainment of the extent of the interest of the miner in his discoveries, and no better basis for a new statute concerning a particular subject was ever found. These rules had sprung from the experiences of miners in the camps of California and Nevada, had spread over adjoining territories and been recognized by all Courts whenever controversies arose under them, requiring settlement and adjustment through legal tribunals. These rules and customs were in the main identical everywhere. They differed but little even in detail, so that it was an easy task for the legislator, conscious of their justice and wisdom, to perpetuate their objects and principles by incorporating them within the statutes of the Union.

They were the normal result of that condition of things which appealed to the general experience and wants of the miner in the pursuit of his calling. Fissure veins, coming from great depths in the crust of the earth, cutting through the several strata composing it, more or less vertical in their general direction and protruding or outcropping at the surface, traceable with comparative ease,

followed downwards without great difficulty, constituted for the most part the deposits of mineral in rock in place which had been discovered and developed up to the year 1872. They were generally but not always found accompanied by a matrix or gangue of quartz. That being the predominant physical characteristic of his ore, the miner in his rules and customs, based his rights and described his duties as far as they related to mining claims, *upon veins or lodes of quartz* or other rock in place; and Congress made use of the same language in section 2320 of Revised Statutes. Following this rule, it also provided, since these veins generally appeared upon the surface, that "no claim shall extend more than 300 feet on each side of the middle of the vein at the surface." So far, then, as they relate to fissure veins or lodes of quartz or other rock in place, the requirements of the National law are few and simple. They meet and cover all exigencies without strained construction, which such physical conditions present; and it was not to be expected that different regulations were necessary or desired since different conditions could not well be foreseen.

The passage of the act of 1872 gave a stimulus to the business of prospecting which caused an immense increase in the population of the western States and Territories, and brought an enormous area of territory hitherto unknown almost immediately into public notice. One of the results of this increased energy in the business of mining was the discovery, in 1876 and 1877, of the great carbonate ore beds or deposits of Leadville. We have already referred to the fact that the sinking of a shaft anywhere through the overlying porphyritic rock to the limestone below either resulted in the immediate discovery of ore, or by drifting upon the line of contact such discovery soon followed. The injustice of taking from the miner an ore body so discovered by him and giving it to another

miner who would subsequently, by sinking a shaft higher up, claim to have discovered and located upon the edge or upper part of such a formation, and stimulated to such discovery by knowledge obtained from the labors of the first locator, is apparent to any unprejudiced mind; yet that question has more than once presented itself to the Courts for consideration. In the summer of 1880 the case of the Iron Silver Mining Company vs. Murphy, 2 McCrary, 121, was tried in the Circuit Court for the District of Colorado; Judge Hallett, then presiding, expressed his opinion upon this subject in the following language: "I will say to counsel in that case, which is not for the consideration of the jury, that it has always been a question in my mind whether a location made on the dip of a vein would not be valid as against one of later date higher up; that is to say, whether, if a location be made upon the dip of a vein, the locator may not pursue it in the downward course, although he may not in the upward course, and may not hold the whole which lies within his location and below it as against any one locating subsequently at a higher point on the same vein."

The question, so far as it related to the position of the deposit within the boundaries of the senior location on the so-called dip, was directly presented to the same Court in Van Zandt vs. the Argentine Mining Company, 2 McCrary, 160, in which case the same Judge decided what has since been the recognized law upon the subject. It is there declared that "although defendant's locations may appear to you to be along the line of the top, apex or outcrop of the vein, it cannot prevail against a senior location on the dip of the lode."

This case, subsequently entitled the Terrible Mining Company vs. the Argentine Mining Company, was appealed to this Court and decided at the last term. It is true that this tribunal did not pass in terms upon the

direct question referred to, but it affirmed the judgment of the Court below, and thus in effect recognized the soundness of the principle.

Argentine Mining Co. vs. Terrible Mining Co., 122 U. S., 578.

It is evident, therefore, that the protection of the first discoverer or locator of the vein, whether at its highest point or not, was one of the objects to be subserved by the act of 1872, and it therefore seems to us to follow that as to the particular vein discovered and patented he should have the same rights of property which are given to those who located by a prior discovery on the highest point or outcrop of the vein. The location in both cases is made upon a mineral vein, lode or ledge, situated upon the public domain; and since the vein or lode is the principal thing, while the surface is regarded as an incident, the statute should operate in the same manner on the rights of the locator in either instance, since otherwise it would discriminate between the rights of the same class of persons acquired through a compliance with its terms. If the right to follow a vein beyond his own lines is denied to the junior locator upon its apex as against the senior discoverer upon its dip, it necessarily follows that it is denied him throughout its entire depth, since it is clear that he cannot skip over the three hundred feet in width of the senior location which intervenes between his claim and that part of the vein beyond, and then proceed as if there had been no interruption of his right or title. If the senior locator or discoverer is to be protected by denying to his junior locator above the right to come within the boundaries of the senior location, then the reasons which justified this course in defining the right of the senior locator above must extend his right below, at least as against one denying it with no title whatever as the

basis of such denial. The identical question we do not think has presented itself before to the consideration of any Court; hence, its discussion must depend almost wholly upon the reason of the proposition, and which reason, we submit, is in accord with the rules established by judicial tribunals in analogous cases.

The preceding statements have been made necessary by the facts disclosed in the transcript of the record. The Crown Point and Pinnacle mines are located largely upon the dip or below the line of the highest part of the lode or deposit. They have been made, however, upon valid location and discovery, and, there being no proof to the contrary, it is to be assumed that they have been made upon senior discoveries of the vein or lode, at least so far as the premises below them are concerned, for it is alleged in the answer, and proven by the testimony, that they were both discovered and located long prior to the location of the Wells and Moyer placer. The grantors of the defendants in error were therefore in possession, and were *proprietors* of the vein or lode contained within the Crown Point and Pinnacle claims at the time of the Wells and Moyer location, to every intent and for every purpose. It is our contention, therefore, that under the third condition or reservation contained in the patent to the Wells and Moyer placer claim, the right of the defendants in error to the deposit in question has been recognized and protected; and, in passing beyond the boundaries of their claim and within their end lines extended, they have proceeded under the sanction of their own grant and the reservations contained in the grant of their adversary. The third proviso of the patent reads as follows: "That the premises hereby conveyed may be entered by the *proprietors* of any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, for the purpose of extracting or

removing the ore from such vein, lode or deposit, should the same or any part thereof be found to penetrate, intersect, pass through or dip into the mining ground or premises hereby granted."

The phraseology used in framing this reservation is general, and it would seem to have been intended to cover any emergency that might arise, to make it necessary for the owner of something outside of and adjoining the premises to go within or beneath them. Under it, a placer claim "may be entered by the *proprietors* of any vein," etc., and it would seem that such entry is not confined to a subterranean one, but may be such an one as the circumstances of a particular case may require. It may be made if the lode or vein penetrates or dips into the placer, and also when it intersects the premises granted. In short, it seems to have been made a part of the patent, in contemplation of the contingency of probable attempts in the future by adventurous persons or companies to acquire large areas of valuable lode mining property under section 2333, in which contingency such an exception would be made necessary to protect, as well as recognize the rights of other proprietors. The exception that we are now considering is not confined to the proprietors of vein or lode claims, the veins or lodes in which might be found to penetrate or intersect the placer, and while the phraseology thus noticed may not be very material in this connection, yet it is so distinct and unmistakable that the decision of Judge McCrary in Sullivan vs. The Iron Silver Mining Company cannot be said to have any application to it. An adjoining proprietor of a placer claim, within which is a lode or vein properly patented, or the existence of which was known and acted upon before the patent, would have the same right under this exception to follow it into some other placer as would the proprietor of a lode claim.

The ouster of which the plaintiff in error complained consisted entirely of the fact that the defendants in error, owners and in possession of the Crown Point and Pinnacle veins or lodes, followed them underneath the Wells and Moyer placer claim and were extracting and removing ore therefrom, they having penetrated or dipped into the said placer from the Crown Point and Pinnacle lodes. The defendants in error were the owners and in possession of the oldest location, and therefore, at the time of the location and entry of the Wells and Moyer placer they were the *proprietors* of the vein or lode mentioned and as such were invested with all rights and privileges incident to or appendant to such ownership.

It is not necessary, therefore, to consider the suggestion that defendants in error are not entitled to the lode underneath the Wells and Moyer placer, because possibly someone else might at some time be able to successfully assert the same right. It is sufficient for us to show that the plaintiff in error has not only shown no title in itself to the deposit in question, but it could not show title elsewhere, while we have proven every fact alleged in the answer by the overwhelming burden of testimony. "In an action by the patentee of a placer to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known to the patentee to exist at the time of applying for the patent and was not included in his application, well pleads the facts which, under section 2333 of the Revised Statutes, precludes him from having any right of possession of the vein or lode."

Sullivan vs. Iron Silver Mining Co., 109 U. S. 550.

We are not aware that the exception we are now considering has ever been presented for construction to more

than one Court. In the case of the Pacific Coast M. & M. Co. vs. Spargo, 8 Sawyer, 645, an entry had been made underneath the placer claim by the owners of a vein which had been located subsequent to the location of the placer. The vein so located was under the surface of the placer and on the land embraced within its boundaries which the defendants had reached by means of a tunnel extending underneath it from without its boundaries. The Courts held that the defendants had no right under their lode location because since it *post-dated* the location of the placer, they could not have been the *proprietors* of the vein at the time of the application for patent to the placer. "There can be no rights of the proprietor" said Judge Sawyer, "to reserve, unless there is a proprietor who has rights to protect at the time the reservation is made when the patent issues; it covers everything embraced in the land to which no prior right has attached, otherwise the patent would not have reserved the rights of the proprietor to the vein, it would have reserved the vein itself." While this decision is subject to the criticism that the other exceptions of the patent are ignored, yet for the purpose of this case it is sufficient to say that the objection so successfully urged against the entry there, cannot be urged here, since the proprietorship of the defendants in error began at a date long anterior to the location of the patent. The Court further says that the language of the exception strictly construed, refers only to mines located outside the land which, by their dip or inclination, penetrate or intersect the mine patented and not to mines discovered or located within it. We are also within the purview of this doctrine, and hence we claim that we have the right as the proprietors of the Crown Point and Pinnacle lode to follow the same on its dip into the placer.

We do not think it is necessary to refer to the various

errors which have been discussed in detail, because that would necessarily require much repetition; and therefore a useless labor that would weary the patience of the Court by the unnecessary extension of an argument which has already occupied too much space. We desire to say generally, however, that all of the different portions of the instruction of the Court which have been excepted to, are not only correct in the expositions of the law which they contain, but are the necessary and logical result of the intention and purpose of the statute and of the previous decisions of the Federal Courts, both of first and last resort, wherever these and kindred questions have been submitted for decision. The text of the Court's charge wherever excepted to must be understood and read with its context. When it is read as a complete instruction, it will be found not only free from error, but to contain a statement of the facts and the law as applicable to them, as concise, simple and luminous as can be presented in any case where the questions are of so novel and complex a character; and while many of the requests of the plaintiff in error undoubtedly contain a true statement of the abstract principles of law, yet wherever they are applicable to the case at bar they will be found to have been given if not in the exact language, nevertheless in substance by His Honor who tried the case in the Court below. Where that was not the case, we think that the principle decided in the case of the *Argentine Co.* v. *The Terrible Co.*, 122 U. S., 478, is applicable. It is there said in answer to the objection that the Court refused to give a certain charge to the jury, "That the instruction as requested of the defendant as a proposition of law is undoubtedly sound. Its refusal, however, did not prejudice the defendant, for the valid location as defined by the Court could only be found in favor of the plaintiff in case the vein discovered by the

locators of the Adelaide claim extended to the ground in dispute. If such were the fact, the principle involved in the instruction asked applied to that claim, and cut off the right asserted by the defendant." So we say here, that if there be any request whatever which was refused and the substance of which was not given, such refusal could not have prejudiced the plaintiff in error, since the principle involved in the instruction asked cut off the right asserted by the defendants. We do not understand it to be good practice in any event to give to the jury a statement involving a principle of law in the abstract; but it should rather be in some way connected with the evidence and its materiality to the particular case thus shown. If we take the vast number of requests which were made on the occasion of the trial below and which extend from folio 169 to folio 183 of the transcript, or about eight pages of the record, we find but very few of them which refer to the testimony in the case or show their applicability to the facts. Hence, independent of any question of their soundness or unsoundness, the course taken with reference to them by the Court below, was the only correct one. We have to ask, therefore, that the instruction given to the jury shall be considered as a whole, and when it is so read and understood it will be, in our judgment, a Herculean task to show wherein it is unsound or wherein the plaintiff was injured in consequence of its giving.

Since the first two exceptions of the patent clearly reserve from its granting clauses the vein or lode of mineral ore then known to exist within the boundaries of the placer, and since the third invests the defendants in error with the proprietary right to enter and extract the ores from underneath the placer, so long as they are taken from the lode or deposit in dispute, and since it has already been determined by this Honorable Court that

under the facts shown at the first trial, and which did not substantially differ from those which appeared at the second, that the plaintiff in error had no right under its patent to the lode or deposit in controversy, we submit that the judgment rendered at the last trial should be affirmed. It has been our endeavor to present the case in the light of every fact which must have pressed itself upon the consideration of the law-making power at the time of the passage of the statute, upon the consequences which a different construction from that sought for would entail, and upon every authority which up to this time can be found bearing upon the questions involved in the record. These are so few in number, that with the exception of the decision heretofore rendered in this cause, the question may be said to be *res integra;* but the considerations which we have urged, while we think them sound and unanswerable, are far more imperfectly expressed than we could wish for. There is one part of counsel's argument with which we agree, and that is as to the importance of the case and the effect which the decision of this Court will have not only upon the interests involved, but upon the mining industries of the West in general. The results of the last decision have been healthy in the extreme. A halt has been called in the effort to acquire enormous tracts of mineral domain under the guise of placers, and the conviction that veins so acquired will still be open to exploration and purchase by citizens of the United States, has destroyed the temptation which hitherto lurked at the bottom of such unholy enterprises. The confirmation of that decision on this hearing will, we trust, forever put an end to such practices and bind all persons to a rigid compliance with the requirements of the National laws and regulations, so that frauds upon the government will be fewer, and the rights of the public in general be protected. A desire to

bring about this condition of things as well as to protect defendant in error in the acquisition of their rights as we and they understand them, are our apologies for presuming so long upon the consideration of the Court.

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Attorneys for Defendants in Error.

124-374
127-374

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

No. 960.

THE IRON SILVER MINING COMPANY,
Plaintiff in Error,

vs.

JOSEPH REYNOLDS AND JOHN D. MORRISEY,
Defendants in Error.

Error to the Circuit Court of the United States for the District of Colorado.

BRIEF FOR DEFENDANTS IN ERROR

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BRIEF FOR DEFENDANTS IN ERROR.

This suit was brought in ejectment by plaintiffs in error May 7, 1884, to the Circuit court for the District of Colorado, November 17, 1884, trial was had and issues found against defendants in error. The cause was brought to this court by defendants in error for review of the errors assigned. The judgment was reversed, as appears from the opinion, and judgment of this court reported in 116 U. S., 687. A second trial was had and issues found for defendants in error. Plaintiffs in error now bring the cause to this court for review on the errors assigned. A brief statement from the pleadings will present the issues involved.

The original complaint (Tr., 1) describes the land or property in controversy by metes and bounds: "Consisting "of 193.43 acres of land, more or less." The fourth paragraph of the complaint describes the property in contro- "versy as: Said land and premises," and avers that the "defendants entered upon a portion of said mining land and "premises, to wit: the north-west portion of the said "above described premises, at and near the north and east "line of said premises, and then and there took possession "of that portion of said mining land and premises, and "wrongfully and unlawfully ousted," etc. This is a description and the assertion of title and right of possession to the surface of the "land" described in the complaint by metes and bounds, consisting of 193 acres, etc. No veins or lodes are mentioned in this complaint.

After answer to this complaint, to wit: November 18, 1884, the complaint was amended and enlarged. By the amendment certain portions of the surface or land were excepted out of the 193 acres, by metes and bounds, and the claim of the plaintiff was enlarged by the following averment, and the plaintiff company alleges that: "It is "the owner * * * of all the leads, lodes, ledges and "valuable mineral deposits of every kind and character, "and all the mineral-bearing rock, earth and metals "therein found."

Defendants pleaded general denial, and among other special defenses, the following: "That at the time of the "survey of the entry and patenting of the said Wells & "Moyer placer claim, a certain vein, lode or deposit of "quartz, or other rock in place, carrying carbonates of "lead and silver bearing ore of great value, called the "Pinnacle Lode, and a certain lode, vein or deposit carry- "ing like minerals of great value, were known to exist

"within the boundaries and underneath the surface of "said placer claim survey, lot number 281; and that the "fact that such a vein, or veins, were claimed to exist, "and did exist, as aforesaid, within said premises, was "known to the patentees of said claims at all the times "hereinbefore mentioned; and that in the application for "a patent for said placer claim the said vein or veins so "known to exist were not included, and were not in the "patent issued upon such application, but were expressly "excluded therefrom.

"And further, in the said patent it was expressly and "in terms reserved that the premises in and by such pat-"ent, conveyed might, by the proprietor of any such vein "or lode of quartz, or other rock in place bearing mineral "or ore as aforesaid, be entered for the purpose of ex-"tracting and removing the ore from said lode, vein or "deposit, should the same, or any part thereof, be found "to penetrate, intersect, pass through, or dip into the "premises by such patent granted."

Upon these issues the second trial was had, evidence submitted, and jury charged in strict conformity with the opinion and direction of this court, expressed and given.

Thus the real question is not whether the court below erred upon the second trial of this cause, either in the admission or rejection of testimony, charging the jury, or refusing the motion for a new trial; but whether this court erred in its opinion and judgment of the law expressed and given in this case when before this court on the former hearing.

The first trial and the contention before this court on review thereof (see *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S., 687), involved the provisions of the law of Congress, under which the placer patent was issued to

Wells & Moyer, as well as the conditions recited in such placer patent. These provisions and conditions were before this court for judicial definition and construction.

We leave the argument of the exceptions taken on the trial to the able counsel for defendants in error who conducted the defense, and will consider only—

1. The effect to be given to the opinion of this court in Reynolds against the Iron Silver Mining Company, *supra*, which was strictly adhered to by the trial court upon the second trial of this cause.

2. Has plaintiff in error shown title in or to the lodes or veins in controversy?

The opinion of this court gave full construction to the law of Congress, and the placer patent under which title to the lodes or veins is sought to be established. A case calling for the construction of this law and the conditions contained in the placer patent was fairly and fully before this court, and until this court reverses itself—that is, modifies or overrules its opinion in Reynolds against Iron Silver Mining Company, the opinion there expressed must constitute the law of this and all like cases.

Before further reference to the former opinion of this court, we desire to call attention briefly to several sections of the law of Congress, defining, controlling and regulating mining properties.

Placers, and veins or lodes are two distinct and separate properties, for which the government charges different prices. The subdivision, or rather partition of these two properties, is expressly made by the definitions and provisions contained in section 2329 of the Revised Statutes which provides: "Claims usually called 'placers,'

"including all forms of deposit, excepting *veins of quartz or* "*other rock in place*, shall be subject to entry and patent "under like circumstances and conditions, and upon simi- "lar proceedings, as are provided for vein or lode claims." Thus the vein or lode constitutes no part of the placer, and cannot be included in or considered as a part thereof.

While this section of the law provides for the entry and patent of placers by proceeding in the same manner required to obtain patent to "vein or lode claims," there is no provision for a discovery and location of placers, so that they could be held by such discovery and location without patent, by spending a certain sum annually in the improvement and development thereof, the same as a vein or lode claim.

In *Moxin* v. *Wilkinson*, 2 Mont., 424, held: "A vein "or lode of 'valuable deposits' does not include a "placer mining claim. This act was adopted as a sub- "stitute for the statute which prescribed the manner of lo- "cating and pre-empting quartz lodes or veins. * * * "In legislating upon this matter, Congress has recognized "the distinction between lodes or viens of quartz and placer "claims. The possessor of the former could procure the "title of the United States a number of years before it was "legal to grant a patent for the latter. The act was "amended by providing that 'claims usually called "placers, including all forms of deposits excepting veins "or quartz, or other rock in place, shall be subject to entry. "(Revised Statutes U. S., section 2329.)"

While the proceedings to enter and obtain patent for placers and lodes are the same, the entry of the former cannot embrace the latter, because such inclusion is expressly prohibited by section 2329 by the words: "except- "ing veins of quartz or other rock in place."

This exclusion does not depend upon the fact as to whether the vein or lode has been discovered or located by one other than the applicant for a placer patent. This division of properties operates exclusively between the United States, as the grantor of placer patents, and the grantee therein named. The exclusion is not limited to a vein or lode *claim*, so called, but the exception excludes all veins of quartz or other rock in place.

Section 2333 provides: "Where the same person, "association or corporation is in possession of a placer "claim, and also a vein or lode (not vein or lode *claim*) "included within the boundaries thereof, application "shall be made for a patent for the placer claim with "the statement that it includes such vein or lode (not "vein or lode *claim*), and in such case a patent shall "issue for the placer claim, subject to the provisions "of this chapter, including such vein or lode (not vein or "lode *claim*), upon the payment of $5.00 per acre for "such vein or lode *claim* (because by such inclusion "it becomes a vein or lode '*claim*'), and twenty-five feet "of surface on each side thereof. The remainder of "the placer claim, or any placer claim, not embracing "any vein or lode claim, shall be paid for at the rate of "$2.50 per acre, together with all costs of proceedings; "and where a vein or lode (not vein or lode *claim*), such "as is described in section 2320, is known to exist within "the boundaries of a placer claim, an application for a "patent for such placer claim, which does not include an "application for the vein or lode claim, shall be construed "as a conclusive declaration that the claimant of the "placer claim has no right of possession of the vein or "lode claim; but where the existence of a vein or lode "in a placer claim is not known, a patent for the placer

" claim shall convey all valuable mineral and other de-
" posits within the boundaries thereof."

The words " vein or lode *claim* " are used in this section with reference to a vein or lode after it shall have been included in an application for a patent; before being so included it is designated in this section simply as a vein or lode.

Section 2329, must be taken and construed in connection with section 2333, because section 2329 separates a vein or lode from a placer, and creates out of placers and a vein or lode—that is, " veins of quartz or other rock in " place," two distinct and independent classes of property; and section 2333 provides the manner in which title to these two classes of property, one underlying the other, may be obtained.

If the placer patentee disregards the mode pointed out in section 2333 (provided he has knowledge of the existence of a vein or lode), he may take title to his placer under the patent, but by virtue of the restrictions, conditions and reservations contained in this section and recited in the patent, he estops himself forever thereafter from claiming any title to or possession of veins or lodes underlying the placer.

Under section 2333 a person " in possession of a placer claim " is considered in possession of " a vein or lode included within the boundaries " of the placer, provided in his application " for a patent for a placer claim " he shall make " the statement that it includes such vein or lode," that is, if he knew of the existence of the vein or lode at the time. Having such knowledge, if he omits the statement of the vein or lode from his application for a placer patent, the vein or lode is eliminated from the

entry of the placer and from the patent, and the possession is limited to that of the placer; if he includes the vein or lode in his application for a placer patent it immediately becomes a vein or lode claim, and the patent shall include both the placer and such vein or lode claim. The vein or lode takes with it in such case twenty-five feet of surface on each side thereof, as an incident of the vein or lode, for which the applicant is required to pay at the rate of five dollars per acre; the balance of the surface within the boundaries mentioned in the application constitutes the placer, for which he is required to pay $2.50 per acre. Thus in the division of these two properties, that is, the separation of the vein or lode from the placer, "25 feet of surface on each side" of such vein or lode is retained as an incident thereto; so if the applicant for a placer patent, knows of the existence of a vein or lode, and includes it in his application for the placer patent, he secures both—that is, he takes title to the vein or lode, and twenty-five feet of surface on each side, which constitutes that property, and the remainder of the surface within the boundaries of the placer applied for, constitutes the placer property and passes as such. Thereafter such properties could be sold, transferred, held, developed and worked separately. The veins or lodes might be transferred by proper deed of conveyance, by the placer patentee, he still retaining full and complete title to the placer.

In these expressions and definitions of these two properties, not only the veins or lodes are carved out of the placer, but twenty-five feet on each side of the vein or lode is excluded from the placer surface, and passes with the vein or lode at a different consideration. So that the placer patentee, having knowledge of the existence

of a vein or lode and making no claim therefor in his application for a placer patent, takes no title to such vein or lode or to the twenty-five feet on each side thereof; that is, the twenty-five feet on each side is as clearly excluded from the placer as the vein or lode. This omission is the applicant's own act. It is a complete surrender of his opportunity to assert the possession and to take title to the vein or lode and the twenty-five feet on each side; and this omission, this surrender, leaves in the United States not only the title to the vein or lode, but also twenty-five feet of surface on each side thereof.

Counsel contends that inasmuch as section 2333 refers to section 2320, only such a vein or lode claim as is described in 2320, and not the vein or lode or "veins of "quartz or other rock in place," described in 2329, can be excluded.

It is clear that the reference in section 2333 to 2320 was for the express purpose of limiting the applicant for a placer patent in taking a vein or lode claim to the measurements of such vein or lode claim fixed by section 2320. Section 2320 covers two distinct and independent subjects: (1) a vein or lode of quartz theretofore located; (2) veins or lodes of quartz not then located or claimed, but which might thereafter be discovered or located and thus become mining claims.

As to the latter class, Congress, in and by this section, simply fixes the lineal measurement of the side and end lines constituting the boundaries of the claim when the vein or lode should be discovered and located. And so Congress, in this section, provides "a mining claim located "after the 10th day of May, 1872, *whether located by one* "*or more persons*, may equal, but shall not exceed, 1,500 "feet in length along the vein or lode. * * * No

" claim shall extend more than 300 feet on each side of " the middle of the vein at the surface, nor shall any claim " be limited by any mining regulation to less than 25 feet " on each side of the middle of the vein at the *surface*," etc.

Does section 2333, standing alone, or taken in connec- with 2329 or section 2320, exclude from the placer patent *only* a vein or lode *claim:* that is, a vein or lode claim claimed by some person other than the placer patentee, before the latter entered or applied for the placer patent? If this is the true construction of this section, if the reservations, exceptions and conditions therein contained are to receive this narrow construction, then this section, so far as it relates to veins or lodes, was a useless piece of legislation, because a prior locator of the vein or lode would be protected against a subsequent entry and application for placer patent without it. No prior rights to the vein or lode could be affected by any statement inserted in the application for a placer patent.

It is expressly provided in section 2332, to wit: " Where such person or association they and their grant- " ors have, held and worked their claims for a period " equal to the time prescribed by the statute of limitations " for mining claims of the state or territory where the " same may be situated, evidence of such possession and " working of the claims for such period shall be sufficient " to establish a right to a patent thereto, under this chap- " ter, *in the absence of* any adverse claim."

Thus a prior claim, or any adverse claimant to the placer claimant or patentee, is expressly protected by this section of the statute; but such protection was not needed. All prior rights arising under the operation of law are protected by the courts without affirmative legislation.

The words "vein or lode" and "vein or lode claim" as used in this section in their several connections, make the construction we maintain more clear. If a "vein or "lode included within the boundaries" in a placer claim is included in the application for a placer, it then, and not until then, becomes as to such applicant or claimant a "vein or lode *claim*"; the instant he makes his application and omits from it a statement of the vein or lode, it ceases to be a "vein or lode claim" by virtue of the "conclusive declaration that the claimant of the placer "claim has no right of possession of the vein or lode "claim."

In his application he must also show such a vein or lode claim as is described in section 2320, to wit: a vein or lode claim described and fixed by the measurements—the number of feet prescribed in this section.

The purpose of these conditions, reservations and limitations was to prevent a placer claimant from obtaining title under an application limited to the placer alone, and by virtue of a placer patent issued upon such application, to take title to indefinite quantities of rich and valuable veins or lodes underlying the same, and at the rate of $2.50 per acre. It was equally the purpose of Congress to prevent a single placer patentee from obtaining, by virtue of a placer patent, title to veins or lodes exceeding in length and width the measurements fixed by section 2320.

The provisions of law providing and defining the mode of acquiring title to placer claims and to veins or lodes underlying the same must be taken and construed together.

In *Haydenfelt* v. *Dancy Gold Company*, 93 U. S., 638, held: "It is true that there are words of present grant in

"this law, but in construing it we are not to look at any "single phrase in it, but to its whole scope, in order to "arrive at the intention of the makers of it. 'It is better "always,' says judge SHARSWOOD, 'to adhere to a plain, "common-sense interpretation of the words of a statute "than to apply to them refined and technical rules of "grammatical construction.' Gyger's Estate, 65 Pa. St., "312. If a literal interpretation of any part of it would "operate unjustly, or lead to absurd results, or be contrary "to the evident meaning of the Act taken as a whole, it "should be rejected. There is no better way of discovering "its true meaning, when expressions in it are rendered am-"biguous by their connection with other clauses, than by "considering the necessity for it and the causes which in-"duced its enactment. With these rules as our guide it "is not difficult, we think, to give a true construction to "the law under consideration."

Under this rule, for the interpretation and construction of statutes, the provisions before us, taken and considered together, are of simple construction. It could not have been the purpose of Congress to have excluded, as it did in section 2329, all "veins of quartz or other rock in place" from placers, and then by section 2333, limit the conditions, exceptions and reservations to such lodes or veins as had become claims—that is, had been discovered and located before the placer claimant made his application. It could not have been the purpose of Congress to limit every location of a vein or lode by section 2320 to not exceeding 300 feet on each side of the middle of the vein at the surface, and not exceeding 1,500 feet in length of surface measurement, and then to expressly adopt this measurement of the "vein or lode" in section 2333 by an express reference to section 2320,

and yet permit a placer patentee to take all known veins or lodes underlying 193 acres and more of placer lands, without limitation as to quantity. We submit that all reservations made in a deed are for the benefit of the grantor, which in this case is the United States. Section 2329 is one of definition; section 2333 is one providing the mode and manner of acquiring title to the placers and to include in such title a vein or lode; and if this mode and manner are not followed then the vein or lode excepted out of the placer by section 2329 remains in the United States. Thus, to accomplish this purpose, the exceptions, reservations and conditions are found in 2333 and recited in the placer patent. Section 2320 is one of mere description, providing the linear measurement, the metes and bounds of veins or lodes when they come to be carved up into claims by discoverers and locators, whether consisting of one or more persons.

The object of section 2333 was to except a lode or vein out of the placer patent, and thus to still leave it in the United States, a part of the public domain, subject to disposition by the United States. This construction was clearly entertained and expressed by the Supreme court of the United States in the review of the former trial of this case (*Reynolds* v. *Iron Silver Mining Co.*, 116, U. S., 687). At page 692, this court, in the consideration of these questions, and the construction to be given to these sections of the law, held: "There is not "in the record any pretense or claim of title in plaintiffs "except that growing out of the placer patent to Wells and "Moyer. If that gave no title to the vein in controversy, "plaintiffs had none. There is no assertion by them of "prior possession, discovery or claim to that vein, nor of

"any other right to it than that it is found beneath the "surface of this placer patent."

At page 693 the court says "the evidence tends to "prove that the lode in controversy was known to "Wells and Moyer, grantees of the United States, at "the time they made application for the placer patent "under which plaintiff claims title, also that Stevens, "a grantee of Wells and Moyer, and grantor of plain- "tiff, knew of the existence of the lode at the time "the application was made for the patent, and pro- "cured the application to be made, with the intention to "acquire title to the lode now in dispute. Yet, while the "lode is not mentioned in the patent, the court held that "for the purpose of this suit the title to it was conferred "by that instrument. It appears to us that such a propo- "sition is opposed to the policy of the acts of Congress in "the different rules which it applies to granting titles "to placer mines and to vein, lode, and fissure mines; to "the express language of the statute; and to the reser- "vations in the patent itself."

The court then refers to the act of Congress of May 10, 1872, and especially section 2329, and at page 694, held: "Placer claims, beginning with section 2329, are "declared to include all other forms of mineral deposits, "except veins of quartz or other rock in place, and may "be entered on similar proceedings as those provided for "vein or lode claims."

The court then quotes section 2333, and considers this section in connection with 2329, as we have heretofore contended was essential to obtain the intended meaning of the words "vein or lode," and the effect of the exception of the same out of a placer patent. The court did not consider 2320 as necessary to aid in the construction of

section 2333, and therefore make no reference to it. Section 2320 can throw no light upon, nor aid in the least degree in the construction of the plain and unambiguous language contained in section 2333. Section 2333, by reference to section 2320, only borrows from the latter section, as we have shown the limit to the measurement of veins or lodes as to length and width.

This court then defines, in its opinion, the difference between a placer and a vein or lode, and say, (page 695): "It is very clear that Congress considered that the vein "of mineral bearing quartz was more valuable than the "surface or placer deposit, and it accordingly, when a "patent was asked, fixed the price of the former at $5.00 "and of the latter at $2.50 per acre, as represented by the "superficial area of the survey. It also for the same "reason limited the quantity of the former, which any "single claimant could obtain from the government in "some cases, to less than half of what he could obtain of "the latter. * * * There was no difficulty in the case "of a patent for a lode or vein, for this necessarily must "include both the surface by which it was measured, "and the vein beneath it. But in the case of a placer mine "whose deposits were superficial, their might be under it "a vein of far more value than the twenty acres of surface "mineral. A man, cognizant of the existence of such a "vein, who could, if he established his right to it as a lode, "secure only a limited part of it, if he could cover it with "a placer claim would thereby increase the quantity of "this vein over what he could get by making a lode "claim in double the amount, and in some cases regu-"lated by the state or local mining laws he might quad-"ruple it. Congress also had to deal with the possibility "that a vein might be discovered under the surface of a

"placer claim after the claimant had received his patent. "What Congress did and intended to do in the presence "of these suggestions, is, we think very plain. It made "provision for three distinct classes of cases:

"(1.) When the applicant for a placer patent is at the "time in possession of a vein or lode included within the "boundaries of his placer claim, he shall state that fact, "and on payment of the sum required for a vein claim, "and twenty-five feet on each side of it, at $5 per acre, "and $2.50 for the remainder of the placer claim, his "patent shall cover both.

"(2.) It enacted that where no such vein or lode is "known to exist at the time the patent is applied for, the "patent for a placer claim shall carry all valuable mineral "and other deposits which may be found within the "boundaries thereof.

"(3.) But in case where the applicant for the placer "patent is not in possession of such lode or vein within the "boundaries of his claim, but such a vein *is known to exist*, "and it is not referred to or mentioned in the claim or pat- "ent, *then the application shall be construed as a conclusive "declaration that the claimant of the placer mine has no "right to the possession of the vein or lode claim.*

"It is this latter class of cases to which the one before "us belongs."

In the definition of the third class, which embraces the case in argument, the court expressly holds that if the vein or lode "is known to exist," and is not stated in the application for a placer patent, then such knowledge of the existence of the vein, and such omission, constitute the "conclusive declaration that the claimant of the placer "mine has no right to the possession of the vein or lode "claim."

The fact that such vein or lode was claimed or was not claimed is not involved; no such distinction is recognized. Therefore, of a patent the court say (p. 697): "The "patent itself declares that it is subject to the following "conditions: First, that it is restricted to any lodes, veins, "or other mineral-bearing quartz which are not claimed "or known to exist at the date of the patent; second, that "should any such vein or lode be claimed or known to exist "within the described premises at the date of the patent "the same is expressly excluded from it."

Counsel for plaintiff in error disagrees with this court as to its construction of these provisions of law and conditions recited in the patent, and this disagreement constitutes the only real ground urged for reversal.

The court in its opinion holds that the reservations and conditions contained in the placer patent may be considered as affecting two distinct classes of veins or lodes, depending upon the following conditions: (1) The class that had been discovered and located, and had thereby become a "vein or lode claim" before the entry of the placer, although such prior discovery and location could not be affected or defeated by a subsequent entry and issue of a placer patent. The reservation of this class in express words prevents any controversy between such prior lode claimant and subsequent placer claimant.

The second class embraces all lodes or veins known to the placer claimant and omitted by him from his application that have not been claimed by other persons; and the title to such veins or lodes so known and omitted still remain wholly in the United States. As to this second class the court say (page 697): "We are of opinion that "congress meant that lodes and veins known to exist "when the patent was asked for should be excluded from

"the grant as much as if they were described in clear "terms. It was not intended to remit the question of their "title to be raised by some one who had or might get a "better title, but to assert that no title passed by the patent "in such case from the United States. It remains in the "United States at the time of the issuing of the patent, and "in such case it does not pass to the patentee. He takes "his surface land and his placer mine and such lodes or "veins of mineral matter within it as were unknown, but "to such as were known to exist he gets by that patent "no right whatever. The title remaining in his grantor, "the United States, to this vein, the existence of which "was known, *he has no such interest in it as authorizes "him to disturb any one else in the peaceable possession "and mining of that vein.*"

This definition of title—finding the veins or lodes in the United States, defeats plaintiff's claim and constitutes a complete defense for defendants to this action. Without a paramount title plaintiff cannot recover. No other construction or effect can be given to these provisions of the law, or to the conditions recited in the patent.

II.

UPON WHOM IS THE BURDEN OF PROOF TO ESTABLISH, IN THE FIRST INSTANCE, TITLE TO THE VEINS OR LODES IN CONTROVERSY?

We have recited so much from the pleadings to show that no vein or lode claim—we mean a vein or lode claim as defined and described in section 2,320—is described, or title thereto asserted in the complaint or the amendment hereto. The general denial pleaded in the answer put in

issue the title of plaintiff—imposed upon plaintiff the burden of proof to show a paramount title in and to the veins or lodes. None of the special defenses pleaded, or the replication of plaintiff thereto could affect or detract from the general denial, or change the burden of proof from plaintiff to defendants.

Plaintiff further charged in its complaint that defendants were in possession. The rule is well established that "Possession *per se* evidences * * * present occupation by right; for the law will not presume a wrong; "* * * for the law will never construe a possession "tortious unless from necessity. On the other hand, it will "consider every possession lawful, the commencement "and continuance of which is not proved to be wrongful. "And this upon the plain principle that every man shall "be presumed to act in obedience to his duty unless the "contrary appears."

Ricard v. *Williams*, 7 Wheaton, 105.

In *Reynolds* v. *Iron Silver Mining Co.*, *supra* this court, in approving this rule, say: "If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength "of his own title, and that the defendant in possession can "lawfully say, until you show *some* title, you have no "right to disturb me, it has not been pointed out to us."

Upon an examination of the record in that case, which is the same as in this, except additional evidence admitted by the court below upon the second trial, under the direction expressed in the opinion of this court reversing the judgment of the first trial, this court found that defendants were in possession, and of this possession say: "It would seem that such possession as this ought to be

" sufficient to enable them to put the plaintiff upon proof " of its title."

The legal effect of this possession—the presumption arising from possession alone, aided by the general denial, placed the burden upon the plaintiff to establish by proof —a preponderance of evidence, a paramount title to the property in controversy, before calling upon defendants to maintain by evidence their special defenses.

In *Pitkin* v. *Yaw*, 13 Illinois, p. 253, held: " A plaintiff " in ejectment must prove on the trial that he had title to " the premises in dispute on the day named in the declara- " tion.

Wood v. *Morton*, 11 Illinois, 547.

In *Hardy* v. *Johnston*, 1 Wallace, 374, in defining the rule fixing the burden of the plaintiff in ejectment, the court held: " The complaint must allege the possession or " seizin of the premises, or of some estate therein by the " plaintiff, on some day to be stated, the subsequent entry " of the defendant thereon, and his withholding the same " from the plaintiff. A denial of its allegations puts in " issue the title of the plaintiff at the date alleged, or at " least his title at the commencement of the action."

A denial of the title of the plaintiff puts his title alone in issue, and the burden is upon the plaintiff to establish a paramount title. The defendant may defeat the claim of the plaintiff by proving title in himself or in any person other than the plaintiff; but defendant is not required to defend against the title of the plaintiff until such title is established. The original complaint limits its averment of title in plaintiff to the placer land. Title to the veins or lodes in controversy was not asserted in the original complaint. The averment that plaintiff is the owner of the

placer is sufficient as to the placer, because the grant of the placer is made without condition. But not so as to the vein, lode or rock in place. We repeat that the law authorizing the issue of this placer patent expressly provides that if the claimant of the placer, at the time of making the application for the patent, knew of the existence of the vein or lode, and did not include in such application for the patent for the placer, an application for the vein or lode, such omission "shall be construed as a conclusive declara-"tion that the claimant of the placer claim has no right "of possession of the vein or lode claim; but where the "existence of the vein or lode in the placer claim is not "known, a patent for the placer claim shall convey all val-"uable mineral and other deposits within the boundaries "thereof."

In *Reynolds* v. *Iron Silver Mining Co.*, *supra*, this court held: "There is not in the record any pre-"tense of claim of title in plaintiffs except that growing out "of the placer patent to Wells and Moyer. If that gave "no title to the vein in controversy, plaintiffs had none. "There is no assertion by them of prior possession, dis-"covery or claim to that vein, nor of any other right to it, "than that it is found beneath the surface of this placer "patent."

The pleadings then before the court have not been changed. The new trial was had under the direction of this court, under the same pleadings then considered, and the view then expressed by this court is directly applicable and equally applies to the present condition of the pleadings and evidence now before the court. Defendants do not institue this suit attacking the title of plaintiff to the placer, but plaintiff seeks through this title to the placer, vested in it by virtue of the placer patent alone,

to absorb the vein or lode without complying with and in direct violation of the law of Congress. So the question at this point in argument arises: What presumption will the court indulge in favor of the plaintiff, and upon whom is the burden of proof to show that either the application for the placer patent did include an application for the vein or lode, or that plaintiff had no knowledge of the existence thereof? That is, is the placer patent sufficient in itself to raise a presumption of title in plaintiff to the vein or lode notwithstanding the foregoing provisions of the law of Congress and the exceptions, reservations and conditions contained in the patent itself?

Under this law of Congress, and the construction given thereto by this court, as we have shown, and under the complaint and amendment thereto, put in issue by the general denial, and thus imposing upon plaintiff the burden to show paramount title as held by this court, plaintiff rested after offering in evidence the following proof of title: First, the placer patent, which contained among others the following "conditions and stipulations":

"Now know ye, that the United States of America, in "consideration of the premises, and in conformity with "said Revised Statutes of the United States, have given "and granted, and by these presents do give and grant, "unto the said Thomas S. Wells and William Moyer, "and to their heirs and assigns the said placer mining "premises above described as lot No. 281, embracing a "portion of the unsurveyed public domain; to have and "to hold said mining premises, together with all the "rights and privileges, immunities and appurtenances of "whatsoever nature *soever* thereunto belonging, unto the "said Thomas S. Wells and William Moyer, and to their

" heirs and assigns forever; subject, nevertheless, to the " following conditions and stipulations:

" *First.* That the grant hereby made is restricted in " its exterior limits to the boundaries of the said lot No. 281, " as hereinbefore described, and to any veins or lodes of " quartz or other rock in place bearing gold, silver, cin- " nabar, lead, tin, copper, or other valuable deposits, " which may hereafter be discovered within said limits, " and which are not claimed or known to exist at the date " hereof.

" *Second.* That should any vein or lode of quartz, or " other rock in place bearing gold, silver, cinnabar, lead, " tin, copper or other valuable deposits be *claimed* or " *known to exist* within the above described premises at " the date hereof, the same is expressly *excepted* and *ex-* " *cluded* from these presents.

" *Third.* That the premises hereby conveyed may be " entered by the proprietors of any vein or lode of quartz, " or other rock in place bearing gold, silver, cinnabar, " lead, tin, copper or other valuable deposits, for the pur- " pose of extracting and removing the ore from such vein, " lode or deposit, should the same, or any part thereof, " be found to penetrate, intersect, pass through or dip " into the mining ground or premises hereby granted."

The patent so offered containing these conditions was followed by the testimony of certain witnesses, tending to identify the placer premises described in the placer patent, and to show plaintiff or their grantors in possession thereof. Proof of possession in the plaintiff was *strictly limited to the placer.* Thereupon plaintiff rested. We contend that the error of the trial court, if any, was against defendants in error in requiring or permitting the

case to proceed when the plaintiff rested, for the reason that it had wholly failed to establish title to the vein, lode or rock in place claimed and asserted in its amendment to the complaint. Even if a vein or lode had been sufficiently described in the amendment or proof, the provision of the law and exceptions, conditions and stipulations recited in the placer patent are simple, plain and unambiguous. They require no construction, but simple enforcement. If an applicant for a placer patent knew of and included the vein or lode in his application for a patent, then such application and patent together would constitute his title to the vein or lode. If he had knowledge of, and did not include the vein or lode in such application, then the placer patent would not pass the title thereto. If he had no knowledge the title would pass.

In *Bowman's Devisees* v. *Waltham et al.*, 2 McLain, 392, held: "The words 'exception' and 'reservation' "are used synonymously in grants and have the same "effect. The effect of the deed does not depend upon "the use of the one or the other of these terms, *but on* "*the facts which they represent.*"

Release of the title to the vein or lode from the exception or reservation contained in the law and recited in the placer patent, depends upon the facts: First, did the applicant for the placer patent know of the vein or lode? If so, did he include the same in his application? Second, or, was he without knowledge as to the existence of the vein or lode? Without the existence and proof of one of these facts the title to the vein or lode is expressly reserved in the United States, excepted out of the grant, and the placer patentee is estopped from asserting either title or possession therein or thereto. The release of an exception or reserva-

tion depending upon a condition will not be presumed. The fact which constitutes a release from an exception or reservation to bring the title of the thing excepted or reserved out of the general granting clause back within such granting clause, must be averred and proved by the party seeking thus to enlarge the grant or to escape exclusion by the otherwise essential effect and operation of such exception and reservation.

In *Greenleaf's Lessees* v. *Birth*, 6 Peters, 310, it was held that in order to ascertain what is granted: "We "must first ascertain what is included in the exception, for "whatever is within the exception is excluded from the "grant."

In the case at bar, if the exception was without condition, the title to the vein or lode would be wholly excluded from the grant. But the exception depends upon a condition, and the condition involves the knowledge and use of that knowledge, or the total want of knowledge, on the part of the applicant for the placer patent, which constitute facts that must be averred and proven by the plaintiff.

A provision of the statute declaring what act of a party shall be sufficient to release the effect of an exception or reservation is not proof that the act was performed.

In *Walker* v. *Whitehead*, 16 Wallace, 317, held: "The "laws which exist at the time and place of the making "of a contract, and where it is to be performed, enter "into and form a part of it. This embraces alike those "which affect its validity, construction, discharge and "enforcement."

The law under which this application for a placer

patent was made enters into the patent and becomes a part of it with the same force and effect as if there recited. So the estoppel contained in the law, to wit: "An application for a patent for such placer "claim which does not include an application for a vein or "lode claim shall be construed as a conclusive declaration "that the claimant of the placer claim has no right of "possession of the vein or lode claim," enters into and constitutes a part of the placer patent upon which plaintiff relies for title. Thus, an application for a placer patent containing no application for a vein or lode, is made by the express language recited, a conclusive declaration of the applicant that he does not claim and will not assert title to or possession of the vein or lode by virtue of such placer patent.

The legal effect of these conditions and reservations must be avoided by averments and proof so as to bring the vein or lode within the granting clause of the patent, pursuant to the provisions of the law we have considered, before defendants are called upon to attack by evidence either the title of plaintiff or to establish a paramount title in themselves or others.

In *Watts* v. *Lindsey*, 7 Wheaton, 161, it was held: "It has been long and well established as a rule of law "and equity that a party must recover on the strength of "his own title and not on the weakness of his adversary's "title."

Under the law we are considering, placers and veins or lodes become two distinct and separate properties. The title to the one, therefore, cannot in and of itself include title to the other. The placer patent is limited to the placer unless one of the facts essential to release the excluding clause and to bring the vein or lode within the

general granting clause is averred and proven by evidence *de hors* the patent. The vein or lode claim from its very nature excludes from it, as a specific class of mining property, a placer.

Moxon v. *Wilson*, 2 Montana, *supra*.

Counsel for plaintiff in error, by his mode of pleading, concedes this separation of properties—that veins or lodes constitute a property separate and distinct from placers, that a placer does not carry with it veins, lodes or rock in place, and therefore a title to a placer is not in and of itself a title to a lode or vein. In the original complaint a property consisting of a vein or lode is neither described or claimed. Veins or lodes underlying the placer as a separate and distinct property, but without further description, are claimed for the first time in the amendment. The hearing was had upon the original complaint and amendment thereto. When plaintiff rested it had established its title to a placer by the introduction of the placer patent, but wholly failed to prove title to the vein or lode by failing to show the application for the placer patent included an application for the vein or lode, or that no knowledge thereof existed at the date of such application, and such proof would have been inadmissible without averment thereof in the amendment to the complaint, at least without describing such a vein or lode as to metes, bounds and measurements defined and mentioned in section 2320. So this court held, in *Reynolds* v. *Iron Silver Mining Co.*, *supra;* "We are of opinion that Congress meant "that lodes and veins known to exist when the pat- "ent was asked for should be excluded from the grant "as much as if they were described in clear terms. It "was not intended to remit the question of their title to "be raised by some one who had or might get a better

" title, but to assert that no title passed by the patent in " such case from the United States. It remains in the " United States at the time of the issuing of the patent, " and in such case it does not pass to the patentee. * * " * The title remaining in his grantor, the United " States, to this vein the existence of which was known, " he has no such interest in it as authorizes him to dis- " turb any one in the peaceable possession and mining of " that vein."

No other construction can be given to the conditions recited in the patent.

III.

We have shown that *the first claim to a vein or lode underlying the placer appears in the amendment to the original complaint.* The claim is general without any description whatever of a vein or lode claim. Had plaintiff in its amendment averred that the applicant for the placer patent had no knowledge at the date of such application of the existence of any veins or lodes underlying the placer, and that therefore, it, the plaintiff, claimed title in and to all veins or lodes underlying the surface of such placer, this question would not arise. If the provisions of the law we have considered were not recited in the placer patent in the form of reservations and stipulations, the placer patent might be sufficient to establish *prima facie* title to veins or lodes. But the provisions of the law are found in the form of reservations and stipulations in the patent itself, and these reservations and stipulations proceed upon the conditions of law under which the placer claimant may or may not take title to the vein or lode by virtue of the placer patent.

It must be borne in mind that we are dealing with two distinct and specific estates; first, the placer, and, second, the vein or lode. The placer patent conveys title to the former without condition, title to the latter upon a condition that depends upon the existence of certain facts. Can it be said that the mere introduction of the placer patent in evidence, without attending proof as to the facts requisite to relieve the conditions of their excluding force and effect, establish title to the vein or lode underlying the placer the same as to the placer, title to which passes without such conditions? If this is true, the distinction between absolute and conditional title has been destroyed without legislation and without legal precedent. We do not assail the patent. We simply ask that it may be accurately weighed judicially.

We contend that the placer passes under this patent without condition, and the introduction of the patent running from the United States, as grantor, to the placer premises therein described, constitutes in itself a complete and paramount title to such placer. We deny that the same rule applies, that the same presumption of proof arises as to the title, to the vein or lode underlying such placer, because the provisions of the law we have considered are interposed in the form of reservations and stipulations recited in the patent itself between the United States as grantor and the placer patentees, which prevent an unconditional title to veins or lodes from passing by virtue of such placer patent to the patentee. It needs no argument to show that there is upon the face of the patent itself a marked difference between the title created by such patent to the placer and to veins or lodes underlying the same. Can it be said that these titles are equal as to these two separate and distinct es-

tates, when one is attended with express conditions, reservations and stipulations, and the other is absolute, unlimited and unqualified?

Notwithstanding plaintiff was required to aver and prove either a want of knowledge, or having such knowledge the application for the placer patent included a claim to the veins or lodes, before defendants could be required to disprove plaintiff's title, or establish title in themselves, yet, without such averment or proof defendants in error established by a clear and manifest preponderance of evidence, that the placer patentees at and before the date of their application for the placer patent knew of the existence of the veins or lodes underlying the placer premises described in the complaint. This fact was a question for the jury, and under the charge of the trial court, given in accord with the opinion of this court, the jury found for defendants, which verdict was sustained against the motion for a new trial and judgment was rendered thereon.

It is clear from an examination of the record in the light of this evidence offered by defendants and admitted by the court, that any evidence offered by plaintiff and refused by the court, if admitted, could or would not have changed the verdict of the jury. But these and all other questions arising upon the rulings of the trial court have been fully and most ably argued by my learned associates, the senior counsel for defendants in error.

Respectfully submitted.

G. W. KRETZINGER,
For Defendants in Error.

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In the Supreme Court

of the United States.

OCTOBER TERM, A. D. 1887.

THE IRON SILVER MINING COMPANY,
Plaintiff in Error,
vs.
JOSEPH REYNOLDS AND JOHN D. MORRISSEY,
Defendants in Error.
} No. 960.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

L. S. DIXON,
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In the Supreme Court

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OCTOBER TERM, A. D. 1887.

THE IRON SILVER MINING COMPANY,
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Defendants in Error.
No. 980.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

I.

We are met by an objection of the sheerest technicality—one, according to the practice hitherto prevailing, not even supported upon technical grounds. The 22d section of the judiciary act of 1789 (section 997 R. S.) has invariably been treated by this court as directory merely, and in practice has never been enforced. The 21st rule, promulgated, amended, and re-announced as stated by counsel opposed, on page 2 of their brief, has ever been regarded as a regulation for the assignment of errors in the briefs of counsel, which, upon the same being made as required by the rule, suffices to present the exceptions or errors relied upon. Such is the light in which the rule has been looked upon by the profession, and such to a very considerable extent at least has been the practice under it, sustained, if not by the express, certainly

by the tacit approval, of the court. In quite a number of causes with which it has heretofore happened that we were connected no other practice than that here adopted was pursued, and they were heard and determined upon errors assigned in the briefs of counsel alone. And the existence and prevalence of such practice, passed as it has been without question on the part of the court, is very easily accounted for. Aside from its possessing all the advantages of the statutory assignment of errors, and some additional points of convenience which the rule was designed to promote, and aside from the acquiescence with which it has been received, it has the express sanction of no less a name than of the late *Mr. Philip Phillips*, to whose rare ability as a jurist and long and varied experience as a practitioner at its bar, the records of this court and the reports of its decisions bear most ample testimony. When *Mr. Phillips*, in 1878, six years after the rule in its present form was promulgated, resolved to favor his professional brethren with a revised edition of his work, dedicated to them, and designed for their especial guidance, and entitled *The Statutory Jurisdiction and Practice of The Supreme Court of the United States*, stated, in Chapter XXII, the meaning and effect of the rule, as acted upon by the court and interpreted by its decisions, and that the proper practice under it was that which we have here adopted, it is by no means surprising that the assignment of errors in the briefs of counsel, without the formula of attaching them to the transcript of record returned, came into quite general use—a proceeding which so far as we know or can ascertain, has not hitherto been disapproved by the court.

And it seems not a little remarkable that the authorities upon which counsel opposed rely to show that our practice is irregular are the very same cited by *Mr. Phillips* (pp. 244, 245) to show that it is correct. In those cases there were no assignments of errors at all, either under the statute or pursuant to the rule, and it was from them, in part at least, that *Mr. Phillips* inferred, as he well might, that an assignment pursuant to the rule would suffice, and was intended to operate, and did operate as a substitute for the directory provision of the statute.

We submit, therefore, that there is no irregularity in our practice; but if there is—if by possibility it shall be the intention of the court to return to and enforce the provisions of the statute—still no such consequence as an affirmance of the judgment below should follow. As *Mr. Phillips* (p. 244) well observes, this would

be too severe a penalty to be inflicted on a client for a mistake of his attorney occurring under such circumstances, especially in a cause of the gravity and importance (as conceded in the brief of counsel opposed, p. 16) here presented.

By the very terms of the rule the court may notice errors not assigned or specified, and of course may do so where they are clearly specified, though not in the precise manner intended by the rule. For ourselves we can conceive of nothing which would have been gained had the assignment been attached to the transcript and printed with the record, or which now would be gained were that proceeding to take place. It would be but laying before the court two printed assignments of the same errors instead of one, which, as it seems to us, would be wholly superfluous. But as already remarked, if the intention be to enforce the statute as well as to require an assignment or specification of errors in the briefs, a word to that effect in this case or any other, from the bench, will serve to set the profession right.

But should the court decline, which we can hardly believe, to act upon the errors as assigned, then we submit that the course prescribed by the rule, when, according to it, a plaintiff in error is in default, should be pursued, and the case dismissed as upon motion, a result which, we believe, would be quite as much the subject of regret on the part of counsel opposed as on the part of ourselves.

The errors assigned were prepared by our associate, and filed with the clerk of this court some considerable time before the commencement of the present term, and are printed at length in his brief.

Of such errors we have incorporated a small number in our brief, being such only as present the few propositions discussed by us; and, in so doing, we think the questions involved or errors relied upon are presented as fully, fairly and intelligibly as it would be possible for us under any circumstances to present them.

II.

To the other positions taken and points urged we have very little to say in reply, beyond what we have already said in our original brief.

1. Counsel are altogether mistaken as to the rulings and practice of the land department in respect to the amount of labor or expenditures required in order to make entry of several contigu-

ous lode claims embraced in a single application for patent. $500 worth of labor or improvements is all that is required for the entry and patenting of any number of lode claims so situated and applied for. In this respect no distinction is made between lode claims and placer claims, unless it be that stated by counsel that $500 worth of labor will only secure the entry of 160 acres of placer ground, while, as the fact is, the same sum expended upon lode claims will authorize the entry and patenting of a much larger tract of land. Whether in actual practice there exists this limitation, which counsel seem to concede, of 160 acres of placer to $500 worth of labor we are not informed, but we are informed, and we believe, correctly, that the other distinction made by them between expenditures upon lode and placer claims does not exist. This, however, is a mere collateral matter touching a supposed, but insignificant, difference of expenditures required of a claimant which, when made, result directly and exclusively to his own benefit. So far as the case under consideration is concerned it has no greater bearing than the difference in the price per acre between lode and placer claims, which was rejected by the court at the former hearing.

2. The argument against us upon the main question verifies the correctness of the statement in our brief, that the cause was tried below upon the theory that the patent was obtained by fraud in some manner, and that that was a matter which could be reached and remedied in this form of action. The case is so presented in argument here,—a view which we insist is totally inadmissible. The proper department of government, clothed with authority to investigate and decide, has determined that the land was patentable as placer and issued the patent in accordance with such determination. That is the end of the matter—it is *res adjudicata* so far as this action is concerned.

3. At page twenty-five counsel quote the first condition or stipulation of the patent, emphasizing the words (referring to veins or lodes) "which may hereafter be discovered within said limits." We feel obliged for attention being called to this language, for it shows that the interpretation of the statute by the land department, so far as it may go, precisely corresponds with our own. It shows that *undiscovered veins or lodes within the limits of the placer*, and therefore unknown, were intended to pass by the patent; that previous discovery within the limits of

the placer was necessary in order that the vein or lode should be excepted from the general operation of the patent; and that an after-discovered vein or lode within such limits is, by the very language of this condition, conveyed to the patentee. It shows that the lode or vein in question being one that, without dispute, was so after-discovered within the limits of the placer, was expressly conveyed by the patent.

4. Counsel express surprise at our proposition for a liberal construction in favor of the rights of purchasers and patentees, and say that we are encountered by the rule that in grants from the government the construction is always against the grantee and in favor of the government. Counsel forget that it is a matter of statutory construction with which we are dealing, and not the mere language of a deed or conveyance executed by some agent of the public. In the latter case, where the mere act of the agent is under consideration and the question is as to the interpretation of the instrument executed by him, the rule invoked may not be without its force, but it has no application to a question of statutory construction like that here presented in which the same rules should govern as in any other case.

5. Neither is there any good ground for saying that any question here discussed passed *in rem adjudicatam* by the former decision. The right of the plaintiff in error to maintain ejectment, discussed and ruled on on the former occasion, was not an adjudication upon any ascertained state of facts—any state of facts which had been passed upon or determined in the action. So far as this court was concerned, it was a decision based upon an erroneous conclusion of law expressed by the court below in its charge to the jury, in a view of the facts as they appeared to, or were assumed by, that court to exist for the purpose of such charge. Acting upon such assumption, but without the facts being found or laid before this court so that it could judge of them, the judgment was reversed for such apparent error. It is obvious from the opinion that this court was not in possession of the facts as they are now made to appear, but that, as would seem from the transcript and maps then before it, it was in reality misled into the supposition that the vein or lode in question extended, on its course or strike, from the premises of the defendants into the placer, where, by its out-crop or development, it was seen and known, and so capable of distinct possession and location within

the boundaries of the placer, and of being included and paid for in the application for the placer patent. It was from such a vein or lode as this, not being included in the application, that the court held that the placer patentee, under the statute, had *no right of possession* and so could not maintain ejectment. We may be wrong, but such is our interpretation of the decision. This is a matter for this court to determine. If, however, we are right, then it is obvious that the decision is not *res adjudicata* when a new and entirely different state of case is presented.

6. Lastly, though probably unnecessarily, we beg to call attention to the case of *The Colorado Coal and Iron Company et al.*, v. *The United States*, the decision of which has been announced since our brief was prepared, and which bears materially upon the question of what constitutes a known lode or vein.

Respectfully submitted,

L. S. DIXON,
For Plaintiff in Error.

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